U.S. Department of Justice

Office of Attorney Recruitment and Management

Washington, D.C. 20530

IN THE MATTER OF ROBERT KOBUS	OARM-WB No. 06-3

FINAL DETERMINATION[1]

Before the Director of the Office of Attorney Recruitment and Management (OARM) is Complainant's request for corrective action (RCA), in which he alleges that the FBI retaliated against him for his whistleblowing activities, in violation of 28 C.F.R. part 27. For the reasons that follow, Complainant's RCA is GRANTED and Complainant is entitled to corrective relief, as ordered below.

BACKGROUND

I. Complainant's employment history and initial allegations of misconduct

Complainant Robert Kobus entered on duty with the FBI on January 5, 1981, as a Clerk in the New York Field Office (NYFO) Operations Center (Ops Center). RCAF, Tab 127 (Complainant's 12/18/08 Affidavit (Kobus Aff.)), ¶ 2. In October 1994, Complainant was promoted to GS-13 Supervisory Technical Information Specialist (STIS) and became the Senior Support Supervisor in the Ops Center. *Id.* In that role, Complainant supervised a staff of approximately 35 employees, including two subordinate support supervisors; reviewed staff work product; and handled other administrative issues. *Id.*, ¶ 3; RCAF, Tab 23, Ex. .. (OIG's 3/15/07 Report and Recommendations) at 3. Complainant and the two other support managers were responsible for certifying support employees' time and attendance (T&A) records. RCAF, Tab

[1] This decision contains references to, and direct quotations from, various documents that were subject to a Stipulated Protective Order signed by the parties on December 14, 2007. Request for Corrective Action File (RCAF), Tab 50. **The parties and any other designated recipients of this Final Determination shall not publicly disseminate this decision or the contents contained herein.**

127 (Kobus Aff.), ¶ 17.

In June 2004, Supervisory Special Agent (SSA) William Powell was assigned to the Ops Center and became Complainant's direct supervisor. *Id.*, ¶ 14. In or about October 2004, SSA Powell instituted a "birthday leave" policy that permitted Ops Center employees to take 2 hours of leave on their birthdays without being charged for annual leave. *Id.*, ¶ 15. Shortly thereafter, Complainant and the two other support managers met with SSA Powell to express their concerns about certifying T&A records, knowing that employees who took birthday leave had not worked the full 8 hours listed on their T&A cards. *Id.*, ¶ 18. Complainant and the two other support managers refused to sign T&A cards that contained birthday leave and, effective December 8, 2004, SSA Powell rescinded their authority to review and certify T&A registers of the support staff under their supervision. *Id.*, ¶ 20, Ex. I.

In December 2004, Complainant complained to SSA Powell's supervisor, Assistant Special Agent in Charge (ASAC) [redacted] about SSA Powell's birthday leave policy and his removal of the support managers' responsibility to sign T&A registers for Ops Center support employees. *Id.*, ¶ 21, Ex. J. Regardless, SSA Powell's birthday leave policy continued into 2005. *Id.*, ¶¶ 22-30.

In early 2005, Complainant believed that SSA Powell was falsifying his own T&A registers and getting paid for time he did not work. *Id.*, ¶ 23. In July 2005, Complainant and the other support supervisors again complained to ASAC [redacted] about SSA Powell's birthday leave policy, and further complained that SSA Powell was also falsifying his own T&A records and engaging in a verbally abusive and inappropriate manner towards them. *Id.*, ¶ 24. Thereafter, on July 21, 2005, ASAC [redacted] sent an e-mail to all Ops Center managers, indicating, in part, that there were "[t]wo issues . . . that disturb[ed] [him] greatly: abrasive language and personnel who do not put in a full day's work." *Id.*, ¶ 26, Ex. K. ASAC [redacted] reminded Ops Center managers that all employees are to adhere to the code of conduct required of FBI employees and to work their hours assigned. *Id.* Complainant again raised the issue of birthday leave when he e-mailed ASAC [redacted] on October 5, 2005, to request that he and SSA Powell meet with ASAC [redacted] to discuss Powell's birthday leave policy and other areas of disagreement between them. *Id.*, ¶ 31, Ex. N.

Meanwhile, in September 2005, Ray Morrow and [redacted] learned that the Ops

Center was going to be transferred from the Counterterrorism Division to the Administrative Division (Admin Div) and they would be taking respective management responsibility of the Ops Center as the Special Agent in Charge (SAC) and ASAC. [redacted] 3/13/08 Dep. at 29-30, 38, 47-48, Ex. 20 ([redacted] 6/5/06 Aff.) at ¶ 7. ASAC [redacted] told [redacted] and Morrow that both Powell and Kobus were "a problem" and they had been sending e-mails to [redacted] complaining about each other. *Id.*, Ex. 20, ¶ 7; Thayer 12/8/08 Declaration., Ex. 2 (OIG's Memorandum of Investigation (MOI) of 5/31/06 Interview of Morrow). On October 5, 2005, in preparation for the transfer of the Ops Center to the Admin Div, SAC Morrow e-mailed Complainant and Powell, stating:

> Willie [Powell] and Robert [Kobus] - I have been made aware of the e-mail battle going on between you two and I am requesting that the e-mails and accusations stop NOW. The Ops Center will be reassigned to the Admin Div on 10/16/05. ASAC [redacted] and I will be meeting with you in the very near future to discuss any and all issues that are pertinent to the Ops Center. This unprofessional display is extremely disturbing to me as both of you are in a leadership position and yet you are showing very little leadership. Neither [redacted] or I will tolerate this behavior. I can assure you that we will provide you with every opportunity to work together in a professional manner. If you cannot, then we will resolve the issue in a manner that best serves the NYO.

[redacted] Dep., Ex. 5 (emphasis in original).

The next day, on October 6, 2005, Complainant sent an e-mail to SAC Morrow and ASAC [redacted] complaining about SSA Powell and alleging that Powell had engaged in various misconduct, including sexual harassment, verbal abuse, retaliation, and T&A fraud. *Id.*, Ex. 4. Complainant alleged that Powell "bangs the book" for more than two hours a day and that there were at least six occasions where Powell signed in, but did not work at all. *Id.* Complainant indicated that the retaliation from Powell stemmed from the unwillingness of Complainant and the other support managers to approve birthday leave instituted by Powell. *Id.* In his e-mail, Complainant also stated:

> [redacted] did not want to touch this area and told me if I wanted to go to OPR [(the Office of Professional Responsibility)], I could. I will not go to OPR because it is not my place. I do not police Special Agents of the FBI. I want to keep my reputation intact. I believe someday an executive manager will see all that is going on.

Id.

II. Handling of Complainant's October 6, 2005 e-mail and October 12 and November 17, 2005 disclosures

Upon receiving Complainant's October 6, 2005 e-mail, SAC Morrow thanked Complainant for his comments and advised him that his allegations "will be addressed." *Id.* SAC Morrow told OIG that he presented Complainant's e-mail to SSA [redacted] "the New York FBI OPR Coordinator" "for appropriate action." OIG's Report of Investigation (ROI), Ex. 30 (OIG's MOI of 5/31/06 Interview of Morrow) at 3. That same day, SAC Morrow told ASAC [redacted] about Complainant's e-mail and "made a reference to OPR or agent [redacted] *Id.*, Ex. 14 (6/2/06 MOI of [redacted] at 6. SSA [redacted] was the supervisor of Squad A-7, and was designated as the FBI OPR representative in the New York Office at the time. [redacted] 3/18/08 Dep. at 14, Ex 7 at 2. "As a result, [redacted] told [Complainant] the OPR issue had been reported, and he should move on." OIG's ROI, Ex. 14 (6/2/06 MOI of [redacted] at 6. SAC Morrow instructed ASAC [redacted] to follow up with SSA [redacted] to obtain the details on Complainant's T&A fraud allegations against SSA Powell. [redacted] Dep., Ex. 20 ([redacted] 6/5/06 Aff.), ¶¶ 21-24.

ASAC [redacted] first reviewed Complainant's October 6, 2005 e-mail on October 11, 2005. *Id.* at 16., Ex. 20 ([redacted] 6/5/06 Aff.), ¶¶ 9-10, 21. Upon review, ASAC [redacted] "immediately referred" Complainant's October 6, 2005 e-mail to SSA [redacted] and asked [redacted] to follow up with Complainant. *Id.*, ¶¶ 10, 21.[2] That same day, ASAC [redacted] sent an e-mail to Complainant and SAC Morrow informing Complainant that SSA [redacted] would be contacting him concerning the six days of T&A fraud by SSA Powell alleged in his October 6, 2005 e-mail. *Id.* at 88, Exs. 4, 20.

SSA [redacted] telephonically contacted Complainant on October 12, 2005, in order to set up a meeting for October 13, 2005, "to elicit from [Complainant] specific dates that he alleged that SSA Powell falsified his time and attendance records." [redacted] Dep. at 48; [redacted] Dep., Ex. 8 at 2.

[2] A December 13, 2005 electronic communication (EC) to FBI Inspection Division drafted by SSA [redacted] and approved by SAC Morrow and ASAC [redacted] states, in relevant part: "Based on the seriousness of STIS Kobus' [10/6/05] allegation, SAC Morrow and ASAC [redacted] tasked New York OPR SSA [redacted] to follow-up with STIS Kobus and determine specific dates of alleged time and attendance fraud (refer to 10/11/2005 e-mail)." [redacted] Dep., Ex. 7.

SSA [redacted] and Complainant did not meet on October 13, 2005, and Complainant was out of the office on approved military leave from October 14 through October 21, 2005 (returning to work on October 24, 2005). Kobus Aff., ¶¶ 46, 50, Ex. V (10/14/05 e-mail from SSA [redacted] to Complainant indicating her desire to "get together and discuss some issues [he] raise[d] in [his] recent e-mail."). On October 28, 2005, [redacted] sent Complainant an e-mail with the subject line "E-mail of 10/06/2005 to SAC Morrow & ASAC [redacted] stating:

> Bob [Kobus]: In an e-mail dated 10/6/2005 (referenced above), you made several allegations against SSA Powell who is the supervisor of the OPC [(Ops Center)]. You have made some very serious allegations (*i.e.*, falsification of T&A registers - birthday leave, that SSA Powell 'bangs the books' by not coming in or is gone for more than two hours[)]. While some of the other allegations are significant, if substantiated, they are performance issues and should be addressed by an ASAC (provided of course that the issues are credible).
>
> I have tried to meet with you twice and you have not responded. Therefore, I am requesting that you respond to this e-mail by close of business Wednesday, November 2, 2005. Specifically, I am requesting the following:
>
> 1. All dates that SSA Powell is alleged to have 'banged the books' and the number of hours you are alleging that he 'bangs the books' for.
>
> At the request of executive NYO management, I am officially following up with information you provided in captioned e-mail. If you have any questions, please call me []. Thanks, [redacted]

[redacted] Dep., Ex. 3.

Complainant was out of the office on pre-approved annual leave from October 28 to November 3, 2005. Kobus Aff., ¶¶ 61-62. When Complainant returned to work on November 3, 2005, he offered to meet with SSA [redacted] however, [redacted] was out on leave the rest of the week and was unable to meet with Complainant until November 7, 2005. *Id.*, ¶ 62. On November 7, 2005, Complainant attended a meeting with ASAC [redacted] SSA [redacted] and SSA [redacted] *Id.*,¶ 63; [redacted] Dep. at 29-30. The purpose of the meeting was to obtain from Complainant the specific dates he was alleging T&A fraud by SSA Powell, so that a proper referral to FBI OPR at FBIHQ could be made. [redacted] Dep. at 29; [redacted] Dep. at 107. The next day, on November 8, 2005, at the direction of SSA [redacted] Complainant met with Squad A-7 SA [redacted] ([redacted] subordinate), and provided her with 23 pages of documentation which he

considered supportive of his allegations against SSA Powell. Kobus Aff., ¶ 69; [redacted] Dep., Ex. 5 at 2.

Following their meeting, SA [redacted] sent Complainant the following e-mail:

> Robert,
>
> Thank you for your time and input today to help clear up some of the issues. In case you need to see it in writing, I'll remind you again that you were correct to bring forward the matter of the birthday leave, which is inarguably inappropriate. Every FBI employee has the responsibility to report irregularities or questionable actions. As for the other matter we discussed, are you available to provide specific dates, and details, backed by your own personal first-hand knowledge, that you know for certain would support an allegation that SSA Powell committed T&A fraud?
>
> Thanks, [redacted]

Kobus Aff., Ex. GG. In a November 9, 2005 email, SSA [redacted] likewise "commended" Complainant for bringing the T&A allegations to her attention, stating:

> Bob: I would like to reiterate what is stated in this [(*i.e.*, SA [redacted] e-mail. You should be commended for bringing the birthday leave matter to our attention. I believe that Willy probably had good intentions, but it is clearly inappropriate for an SSA to authorize birthday leave. This specific area will be referred to ASAC [redacted] as a performance issue and I would recommend that SSA Powell be orally reprimanded and this issue documented in his personnel file. Additionally, his actions placed you in a precarious situation since you are responsible for signing the FD 420s.
>
> I will not be in the office on Thursday [(November 10, 2005)]; therefore, please make certain that you respond via e-mail to [redacted] and myself about specific dates or first hand knowledge that SSA Powell committed T&A fraud. If you are able to provide the above, it WILL BE referred to OPR. If you have any questions, please call me.
>
> Thank you. [redacted]

Id. (emphasis in original). On November 9, 2005, ASAC [redacted] sent an e-mail to Complainant, SSA [redacted] and SA [redacted] which stated:

> Robert/[redacted] I will make an appointment to officially speak to SSA Powell, to counsel him on this performance issue and to document the oral reprimand. I thank all of you for your hard work, ethics and dedication.

Id.

Complainant e-mailed SSA [redacted] on November 9, 2005, to request an additional meeting with SA [redacted] advising that he had in fact provided dates and times, *i.e.*, he "gave SA [redacted] 24 pages on what [he] had observed and what [he] believe[d] transpired[,]" with regard to his allegations against SSA Powell. [redacted] Dep., Ex. 5 at 7. Complainant indicated that another meeting would help him understand what exactly SSA [redacted] was looking for in order to initiate an OPR case concerning the alleged T&A fraud. *Id.*, Ex. 6 at 2. SA [redacted] and ASAC [redacted] again met with Complainant to determine whether he had direct knowledge of T&A fraud by SSA Powell. Kobus Aff., ¶¶ 70-75; [redacted] Dep. at 138-145, Ex. 8 (11/18/05 EC summarizing 11/9/05 meeting).[3] On or around November 14, 2005, SSA [redacted] received a document authored by Complainant on November 8, 2005, in which he identified 11 dates that he alleged SSA Powell signed in and was not present at work for a period of time during the day or the entire day. [redacted] Dep., Ex. 2, Ex. 5 at 2. ASAC [redacted] ultimately "advised [Complainant] that he was repeating gossip, and making assumptions [with respect to his allegations against SSA Powell] based on incomplete and inaccurate facts." [redacted] Dep., Ex. 8 at 8. "As such, [ASAC [redacted] concluded that] further investigative effort was not founded." *Id.*

In a letter dated November 17, 2005, to the Department's Office of Inspector General (OIG), Complainant, through counsel, again disclosed his allegations involving SSA Powell's birthday leave policy and other T&A abuses and, additionally, sought protection from whistleblower reprisal under 28 C.F.R. part 27. Kobus Aff., Ex. II.

III. Events following Complainant's disclosures

A number of events took place after Complainant made his initial disclosures in October 2005 involving his allegations of T&A abuse by SSA Powell, including, but not limited to the following:

- On October 6, 2005, Complainant requested military leave for October 7, October 14, and October 17, 2005. [redacted] Dep., Ex 11. On October 11, 2005, SAC [redacted] advised Complainant that military orders needed to be presented to the SSA [(*i.e.*, SSA Powell)] before he would be authorized to

[3] There is a discrepancy in the record as to whether this second meeting took place on November 9 or 10, 2005. The FBI's EC documents the meeting as taking place on November 9, whereas Complainant alleges the meeting took place on November 10. *Id.* Regardless, whether the meeting took place on November 9 or 10 has no affect on the outcome in this case.

report for duty. *Id.* Complainant advised ASAC [redacted] that he had a letter from his commanding officer documenting his military duty. *Id.*; Ex. 20 ([redacted] Aff.), ¶ 47. ASAC [redacted] told Complainant to provide the documentation to SSA Powell, and advised Complainant that "[the] decision is SSA Powell's." *Id.*; Powell 3/19/08 Dep., Ex. 13 ([redacted] 10/13/05 e-mail to Complainant). SSA Powell approved Complainant's request for military leave, but advised him that he still needed "the actual orders or sufficient documentation for this tour . . . ." *Id.*, Ex. 13 (Powell 10/13/05 e-mail to Complainant).

- On October 17, 2005, SSA Powell sent an email to Ops Center employees directing that two Bureau vehicles be parked in the garage for each month between November 2005 and September 2006, due to the "gas budget." Kobus. Aff., ¶ 47, Ex. W. For each month, the first vehicle on the list rotated among agents in the Ops Center, while the second vehicle was consistently listed as Complainant's. *Id.* Two days later, on October 19, 2005, while Complainant was on approved military leave, SSA Powell sent two agents to Complainant's residence to retrieve the FBI vehicle that had been assigned to him for over 11 years while he served as STIS in the Ops Center. *Id.*, ¶ 49.

- On October 24, 2005, Complainant was summoned to attend a meeting with ASAC [redacted] and SSA Powell. *Id.*, ¶ 50, [redacted] Dep., Ex. 20 ([redacted] 6/5/06 Aff.), ¶ 30. At that time, ASAC [redacted] informed Complainant that he was being temporarily reassigned for 120 days, from his STIS position in the Ops Center (where he supervised approximately 35 employees), to the position of Occupational Safety Officer (where he had no supervisory responsibilities). Kobus Aff., ¶ 51. The temporary intra-office reassignment (TDY) was effective October 30, 2005. [redacted] 3/18/08 Dep., Ex. 1 (10/26/05 EC). Upon Complainant's return from annual leave on November 3, 2005, Complainant reported to his new supervisor, SSA [redacted] [redacted] Kobus Aff., ¶ 56. SSA [redacted] assigned Complainant to a desk in a reception area on a largely vacant floor (the 24th floor) at 26 Federal Plaza. [redacted] Dep. at 42, 104-106; Kobus Aff., ¶¶ 56-60; Mershon 3/31/08 Dep. at 36-37.

- In late January 2006, Complainant made a request to SSA [redacted] for military leave to complete inactive duty training (IDT) in February 2006. Kobus Aff., ¶ 99. SSA [redacted] conferred with ASAC [redacted] regarding Complainant's request, and she informed him that military orders were required for Complainant to take military leave. [redacted] Dep. at 63. [redacted] advised Complainant that he would not receive military leave for IDT unless he provided military orders from the Coast Guard. Kobus Aff., ¶ 99. After Complainant provided information from the human resources office at FBIHQ on February 9, 2006, indicating that military orders were

not required to take IDT military leave, [redacted] granted Complainant's request. *Id.*, ¶ 100, Ex. PP; [redacted] Dep. at 66-67, Ex. 6.

- On March 1, 2006, ASAC [redacted] in conjunction with SAC Morrow's authorization, extended Complainant's TDY as Occupational Safety Officer for an additional 120-day period, effective February 27, 2006. Kobus Aff., ¶ 109, Ex. VV; [redacted] 3/31/08 Dep. at 22, 24. [redacted] extended Complainant's TDY a second time, for another 120 days, in or around June or July of 2006. Kobus Aff., ¶ 109; [redacted] Dep. at 32-33. Complainant was then reassigned to the temporary position of Physical Security Specialist, effective November 12, 2006, for 120 days. [redacted] Dep. at 99-100, Ex. 9; Kobus Aff., ¶ 113, Ex. XX. Complainant's TDY to the Physical Security Specialist position was extended three times, in April, July, and November 2007. *Id.*, ¶ 116, Ex. YY.

- On March 2, 2006, SSA [redacted] told Complainant that he was no longer permitted to enter the Ops Center, despite that the Ops Center was still the post of Complainant's "permanent" STIS position. Kobus Aff., ¶ 101; [redacted] Dep. at 39; [redacted] Dep. at 70-72. During a September 19, 2006 meeting, SSA [redacted] questioned Complainant about whether he had been in the Ops Center within the previous few weeks. Kobus Aff., ¶ 105, Ex. RR (Complainant's 9/28/06 e-mail to Mershon and [redacted] Complainant acknowledged that he had been there to assist a colleague (and former subordinate) who was performing the duties of his former STIS job. *Id.* At that time, [redacted] again told Complainant that he was no longer permitted to enter the Ops Center. *Id.*; [redacted] Dep. at 78.

- On June 16, 2006, SAC Morrow and ASAC [redacted] issued an internal canvas for a temporary GS-14 Acting Administrative Officer (AO) position. Kobus Aff., Ex. SS. Complainant submitted his application for the position to ASAC [redacted] on July 5, 2006. *Id.*, Ex. TT; [redacted] Dep. at 56. The position was not expected to exceed 120 days because the incumbent Acting AO [redacted] position was expiring and was not to be renewed. [redacted] Dep. at 57. After receipt of the applications for the position, [redacted] and SAC Morrow requested that [redacted] continue in the position through the NYFO's inspection scheduled for October 2006. *Id.* at 59-60. Initially, [redacted] did not want to continue in the position through the inspection. *Id.* at 57. Since the Acting AO position was scheduled to terminate when a permanent AO was hired, the FBI issued a vacancy announcement for a permanent AO on July 7, 2006, for which Complainant submitted his application on July 21, 2006. Kobus Aff., ¶ 108; RCAF, Tab 24, Ex. 3C. Shortly thereafter, ASAC [redacted] and SAC Morrow sought to non-competitively promote [redacted] to the GS-14 AO position; FBIHQ denied that request. RCAF, Tab 24, Ex. 3E; Thayer 12/18/08 Declaration, Ex. 18. Ultimately, [redacted] agreed to stay in the Acting AO position through the inspection. So, after discussing the matter

with SAC Morrow, [redacted] cancelled the vacancy announcement for the Acting AO position. [redacted] Dep. at 57-61. On August 2, 2006, Complainant received notice that "[his] application [for the permanent GS-14 AO position] was not referred to the selecting official for further consideration because [he] [was] not among the best qualified." Kobus Aff., Ex. UU.

- In January 2008, as a result of OIG's March 2007 report of investigation (discussed below), Assistant Director in Charge (ADIC) Mark Mershon reassigned Complainant to a permanent position as a GS-13 Deputy Administrative Officer (AO), where he supervised a staff of more than 40 people, had an office, and the use of an FBI vehicle. RCAF, Tab 127 (Complainant's Merits Brief) at 26; Kobus Aff., ¶¶ 117-118; Mershon Dep., Ex. 3 (7/13/07 EC from the Director's Office to ADIC Mershon).[4]

PROCEDURAL HISTORY

Complainant filed his RCA with OARM on May 3, 2006. RCAF, Tab 1. In his RCA and initial jurisdictional submissions, Complainant alleged that he was subject to numerous retaliatory personnel actions by the FBI as a result of his disclosures of alleged T&A fraud by SSA Powell. RCAF, Tabs 1, 24, 27 Specifically, Complainant alleged that he made disclosures regarding SSA Powell's alleged misconduct to ASAC [redacted] on December 9, 2004, and in July and October 2005; SAC Morrow on October 6, 2005; and to OIG in his November 17, 2005 reprisal complaint. *Id.* Complainant further alleged that "[o]n several occasions in 2005," he "attempted to disclose [SSA] Powell's misconduct to [SAC] Charles Frahm, but Frahm refused to meet with [Complainant]." RCAF, Tab 24 at 2.

On July 7, 2006, OARM granted Complainant's request to hold his RCA in abeyance until OIG concluded its investigation into the allegations he raised in his reprisal complaint filed with OIG on November 17, 2005. RCAF, Tabs 11, 12.

On March 15, 2007, in accordance with 28 C.F.R. § 27.4(a), OIG provided OARM with its March 8, 2007 report of investigation of Complainant's reprisal complaint. RCAF, Tab 13. OIG found that Complainant had made a protected disclosure to SAC Morrow on October 6, 2005, regarding SSA Powell's alleged T&A fraud. *Id.* OIG further concluded that there were

[4] In a letter to OIG dated July 13, 2011, Complainant, through counsel, indicated that his stay in the Deputy AO position was "short-lived," as, in or about June 2009, the FBI purportedly eliminated his Deputy AO position and reassigned him to the position of Operations Manager. This allegation is part of a separate RCA, which Complainant filed with OARM on November 30, 2011.

reasonable grounds to believe that Complainant's protected disclosure in that regard was a contributing factor in the FBI's decision to: (1) take away Complainant's assigned Bureau vehicle after 11 years; (2) transfer him from his STIS position, where he supervised 35 employees, to the position of Safety Officer, with no supervisory responsibilities; and (3) move him from an office in the Ops Center to a cubicle on a largely vacant floor. *Id.* As corrective action, OIG recommended that OARM direct the FBI to restore Complainant to the position of a senior administrative support manager in the New York Division or equivalent position. *Id.*

On April 23, 2007, the FBI moved to dismiss portions of Complainant's RCA and OIG's report and recommendations. RCAF, Tab 23. The FBI argued specifically that Complainant's only protected disclosure consisted of his November 17, 2005 complaint of reprisal to OIG, and, as a result, OARM lacked jurisdiction over any alleged retaliatory conduct committed prior to that date. *Id.*

The parties filed their respective responses to the other party's submission on May 15, 2007, and their surreply briefs on May 21, 2007. RCAF, Tabs 27-30.

In his surreply brief, Complainant alleged for the first time in his RCA, that, on October 12, 2005, he made a protected disclosure regarding SSA Powell's alleged misconduct to SSA [redacted] "the representative of the FBI's Office of Professional Responsibility (FBI OPR) in the New York Office." RCAF, Tab 30 at 2. Thus, according to Complainant, OARM had jurisdiction over "any act of reprisal which [he] allege[d] that the FBI took against him after October 12, 2005." *Id.* The FBI responded to Complainant's "newly asserted basis for jurisdiction" on June 1, 2007, arguing that Complainant's October 12, 2005 disclosure to SSA [redacted] is not "protected" since: (1) the squad to which SSA [redacted] was assigned in the NYFO (Squad A7) was not part of FBI OPR; and (2) Complainant had not established that he relied upon a mistaken belief that Squad A7 was part of FBI OPR when he made his disclosure to SSA [redacted] RCAF, Tab 35.

By Opinion and Order dated October 3, 2007, OARM concluded that Complainant failed to make a nonfrivolous allegation of a protected disclosure with respect to his disclosures allegedly made to ASAC [redacted] SAC Frahm (which included an "attempted" disclosure), and SAC Morrow, as none of those individuals are designated recipients listed under 28 U.S.C. § 27.1(a). RCAF, Tab 37. OARM further concluded that Complainant had established OARM's jurisdiction with respect to his allegations that his disclosures concerning SSA Powell's alleged

T&A fraud made to SSA [redacted] and OIG respectively on October 12 and November 17, 2005, were protected by 28 C.F.R. § 27.1(a), and that at least one of his disclosures in that regard was a contributing factor in the FBI's decision to take or fail to take various alleged personnel actions covered by 28 C.F.R. § 27.2(b) against him, including its decision to: (1) threaten to deny Complainant's use of military leave on October 24, 2005, and in early 2006; (2) remove Complainant's use of his assigned Bureau car on October 19, 2005; (3) temporarily reassign Complainant from his STIS position in the Ops Center to the Safety Officer position (on an abandoned floor), effective October 30, 2005 (and extend that reassignment and subsequently reassign him to the Physical Security Specialist (and extend that reassignment))[5]; (4) verbally abuse and harass Complainant and ban him from the Ops Center; and (5) fail to select Complainant for the GS-14 Acting and/or Permanent AO position(s). *Id.*

The FBI and Complainant engaged in extensive discovery and submitted their final post-discovery submissions on the merits of the case on April 1 and April 23, 2009, respectively. RCAF, Tabs 141, 146.

ANALYSIS & FINDINGS

Because Complainant previously established OARM's jurisdiction over his RCA, we now turn to the merits of his RCA as a whole. *See Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, ¶ 14 (2008).[6] In reviewing the merits of an RCA, OARM must examine whether Complainant established by preponderant evidence that he engaged in whistleblowing activity by making a protected disclosure under 28 C.F.R. § 27.1(a), and that such whistleblowing activity was a contributing factor in the FBI's decision to take or fail to take, or threaten to take or fail to take, a personnel action covered by 28 C.F.R. § 27.2(b) against him. If he does so, OARM shall order corrective relief, unless the FBI establishes by clear and convincing evidence that it would

[5]Although OIG characterized the action as a "transfer," we note that it is actually a "reassignment" under Office of Personnel Management (OPM) regulations. Specifically, under OPM regulations a "reassignment" involves a change in position without promotion or demotion "within the same agency," whereas, a "transfer" involves a change from a position in one agency to a position in another agency. *See* 5 C.F.R. § 210.102(b)(12), (18); *Talley v. Dep't of Justice*, 50 M.S.P.R. 261, 263 (1991) ("'transfer' means a change of an employee from a position in one agency to a position in another agency").

[6] Although the case law of the U.S. Merit Systems Protection Board (the Board) and the U.S. Court of Appeals for the Federal Circuit is instructive and looked to for guidance, OARM is not bound by such precedence.

have taken the same personnel action(s) in the absence of the disclosure. *See Fisher*, 108 M.S.P.R. 296, ¶ 15; 28 C.F.R. § 27.4(e)(1), (2).

For the reasons given below, we find, based upon the written evidence of record, that Complainant has proved the merits of his RCA by preponderant evidence, the FBI has failed to prove by clear and convincing evidence that it would have taken the personnel actions at issue in the absence of Complainant's protected disclosures, and Complainant is entitled to corrective relief.[7]

I. Complainant has established by preponderant evidence that he made disclosures protected by 28 C.F.R. § 27.1(a).

Complainant's disclosures will be considered "protected" under 28 C.F.R. § 27.1(a) if he proves by preponderant evidence that: (1) he made his disclosures to designated recipient individuals or entities specified under that regulatory provision; and (2) he had a "reasonable belief" that his disclosures evidenced a violation of any law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

A. Complainant has established by preponderant evidence that his disclosures were made to designated recipients under 28 C.F.R. § 27.1(a).

At the time Complainant filed his RCA, the applicable FBI whistleblower regulations, 28 C.F.R. § 27.1(a), provided that, in order to be "protected" under that provision, a disclosure of information must have been made to at least one of the following individuals or offices: the Department of Justice's OPR, OIG, FBI OPR, the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office.[8] The highest ranking official in each FBI field office is generally a SAC. The

[7] It is appropriate for OARM to decide this matter based on its review and consideration of the written evidence of record, as hearings before the Director of OARM are discretionary under 28 C.F.R. § 27.4(e)(3). *See Ingram v. Dep't of the Army*, 116 M.S.P.R. 525, ¶ 6 (2011) ("Where the administrative judge's findings are not based upon witness demeanor, the Board may make its own factual judgments based upon the record."); *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1302 (Fed. Cir. 2002).

[8] By final rule dated January 9, 2008, the Department of Justice effected several technical amendments to relevant portions of the regulations that provide whistleblower protections to FBI employees, 28 C.F.R. parts 0 and 27. *See* 73 FR 1493-02 (Jan. 9, 2008). The amendments include, among other things, the addition of "the FBI Inspection Division (FBI-INSD) Internal

exceptions are the FBI field offices in Los Angeles, CA, New York, NY, and Washington, D.C., where the highest ranking official is an ADIC. *See* 64 FR 58783 (Nov. 1, 1999). Because Complainant was assigned to the NYFO, his highest ranking official at the time of his disclosures was ADIC Mershon.

1. Complainant's October 6, 2005 disclosure to SAC Morrow

As stated above, OARM previously determined that it lacked jurisdiction to consider Complainant's claim regarding his alleged protected disclosure to SAC Morrow on October 6, 2005, as SAC Morrow was not a proper recipient under 28 C.F.R. § 27.1(a). RCAF, Tab 37.

In light of the voluminous record of evidence presented to OARM after the parties engaged in extensive discovery, we now find that OARM has jurisdiction over – and Complainant has established by preponderant evidence – his claims that SAC Morrow was a proper recipient of Complainant's October 6, 2005 disclosure.[9] This finding hinges on OARM's prior precedent, in which OARM has held that a disclosure made to an individual or office not designated as a proper recipient of a protected disclosure under 28 C.F.R. § 27.1(a) may nonetheless be protected where the complainant establishes that it was reasonable for him to rely on the person to whom the disclosure was made to transmit the disclosure to one of the designated offices or individuals, and the disclosure was in fact so transmitted.

It is undisputed that, upon SAC Morrow's receipt of Complainant's October 6, 2005 disclosure, he assured Complainant that his allegations would be addressed and advised ASAC [redacted] of Complainant's disclosure (and made reference to OPR or SSA [redacted] subsequently told Complainant the OPR issue had been reported; SAC Morrow instructed ASAC [redacted] to follow-up with SSA [redacted] to obtain the details of Complainant's T&A allegations against SSA Powell detailed in his October 6, 2005 e-mail; and [redacted] forwarded Complainant's

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Investigations Section" to the list of offices designated to receive a protected disclosure in 28 C.F.R. § 27.1(a). This change does not affect OARM's decision on Complainant's RCA, as he does not claim that he made a protected disclosure to FBI-INSD Internal Investigations Section.

[9] The issue of OARM's jurisdiction is always before OARM and may be raised by either party or by OARM sua sponte at any time during an OARM proceeding. *See Hasanadka v. Office of Personnel Management*, 116 M.S.P.R. 636, ¶ 19 (2011) (same holding as applied to Board jurisdiction). Based on our review of the record, Complainant has made a non-frivolous allegation that his October 6, 2005 disclosure to SAC Morrow was protected within the meaning of 28 C.F.R. § 27.1(a), and the record evidence proves that allegation by preponderant evidence.

October 6, 2005 e-mail to SSA [redacted] (who, as discussed below, is a proper recipient of a protected disclosure under 28 C.F.R. § 27.1(a) (*i.e.*, FBI OPR)) on October 11, 2005, and advised Complainant that SSA [redacted] would be contacting him for additional information pertaining to his allegations. Based on the record evidence, we find that it was reasonable for Complainant to rely on SAC Morrow to transmit his October 6, 2005 disclosure to a proper recipient office or entity (FBI OPR), in light of statements made to him by SAC Morrow and ASAC [redacted] and the fact that his disclosure was actually transmitted to FBI OPR/SSA [redacted] via ASAC [redacted] per Morrow's directive.

Accordingly, based on the circumstances and evidence presented on the merits of Complainant's RCA, we conclude that SAC Morrow was a proper recipient of Complainant's October 6, 2005 disclosure under 28 C.F.R. § 27.1(a).

2. Complainant's October 12, 2005 disclosure to SSA [redacted]

We find the evidence of record sufficient to support a finding that SSA [redacted] as the OPR representative of the NYFO, was a proper recipient of Complainant's disclosure under 28 C.F.R. § 27.1(a). In light of its size, *i.e.*, approximately 2,000 employees, the NYFO is the only office in the FBI with an OPR supervisor. [redacted] Dep. at 18; Thayer 12/18/08 Declaration, Ex. 27 ([redacted] Dep.) at 14. In the NYFO, Squad A-7 is the squad – made up of only [redacted] and [redacted] – designated as the "Office of Professional Responsibility." RCAF, Tab 30, Ex. 15 (5/18/07 Organizational Chart of NYFO Admin Div). Squad A-7 is tasked with the investigation and supervision of allegations of employee administrative and criminal misconduct. SSA [redacted] Dep. at 14. SSA [redacted] who identified herself during her deposition as the supervisor of Squad A-7 and OPR, explained that it was her responsibility to vet the allegations that she would receive from NYFO employees, and refer them to FBIHQ for a determination as to whether an investigation is warranted. *Id.* at 14, 39-40; [redacted] Dep. at 15-18. Although Squad A-7 may not technically be part of FBI OPR's organizational structure or play a role in its adjudication of misconduct cases involving FBI employees, the record evidence shows that SSA [redacted] was in a position in an office identified as OPR, she held herself out as the OPR supervisor, and she acted as the point of contact for FBI employees in the NYFO wishing to report allegations of misconduct or wrongdoing by NYFO employees. Thus, we conclude that Complainant's October 12, 2005 disclosure to SSA [redacted] was effectively made to a qualified office (*i.e.*, FBI OPR) under 28

C.F.R. § 27.1(a).

The FBI argues that because SSA [redacted] did not actually interview Complainant during their phone call on October 12, 2005, there was no substantive report of alleged misconduct by SSA Powell and, therefore, no "disclosure" of information by Complainant. RCAF, Tab 133 (FBI's Merits Brief) at 2-4. We disagree. According to the FBI's own documentation, the purpose of SSA [redacted] October 12, 2005 contact with Complainant was to "elicit from [Complainant] specific dates that he alleged that SSA Powell falsified his time and attendance records," and "to vet out information [he] provided in an e-mail to SAC Morrow on 10/6/05." [redacted] Dep., Ex. 8 (11/18/15 EC) at 2. As set forth above, Complainant's October 6, 2005 e-mail – which was forwarded to [redacted] by [redacted] on October 11, 2005 – claimed, among other things, that Powell falsified his T&A cards for at least six days and "bangs the book" every day for more than two hours. Kobus Aff., Ex. P. Even if specific dates or other substantive issues underlying Complainant's allegations were not identified during the October 12, 2005 conversation between SSA [redacted] and Complainant, we believe that it is more likely than not that, at the very least, the substance of his disclosure, *i.e.*, SSA Powell's alleged T&A abuse, was mentioned in the course of their conversation. *See* [redacted] Dep., Ex. 7 (12/13/05 EC) at 2 (stating, in relevant part: "Following numerous attempts to obtain specific dates from STIS Kobus (**10/12/05**, 10/14/2005 10/28/2005), [Complainant] finally responded to SSA [redacted] [redacted] on 11/03/2005 advising that he agrees to discuss this matter but only in the presence of the attorneys he has 'retained to assist [him] with this situation.'") (emphasis added). We therefore find unpersuasive the FBI's argument that Complainant did not make a viable disclosure on October 12, 2005, when SSA [redacted] contacted him to set up a time to discuss the specifics of his allegations against SSA Powell.

3. Complainant's November 17, 2005 disclosure to OIG

It is undisputed that Complainant's November 17, 2005 disclosure to OIG was made to a proper recipient office under 28 C.F.R. § 27.1(a).

B. Complainant has established by preponderant evidence that he reasonably believed his disclosures of time and attendance abuse by SSA Powell evidenced a violation of law, rule, or regulation, and an abuse of authority.

To establish that he had a reasonable belief that his disclosures met the criteria set forth in

28 C.F.R. § 27.1(a), Complainant need not prove that the matters disclosed actually evidenced a violation of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See McCarthy v. International Boundary & Water Comm: U.S. and Mexico,* 116 M.S.P.R. 594, ¶ 34 (2011). Rather, he must show that the matters disclosed were ones that a reasonable person in his position would believe evidenced any of the situations specified in § 27.1(a). *See id.* In assessing whether a belief is reasonable, the test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidenced a violation of any law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See Hamilton v. Dep't of Veterans Affairs*, 115 M.S.P.R. 673, ¶ 25 (2011).

Complainant alleges that he reasonably believed his disclosures to SSA [redacted] and OIG regarding SSA Powell's alleged T&A abuse and birthday leave policy evidenced a violation of law, rule, or regulation, and an abuse of authority. RCAF, Tab 127 (Complainant's Merits Brief) at 31-35. Complainant's claim that he reasonably believed SSA Powell's birthday leave evidenced a violation of law, rule, or regulation is supported by that fact that, as early as October 2004, he and two other support staff supervisors, [redacted] and [redacted] met with Powell to voice their concerns with his birthday leave policy and the fact that "they felt it was against bureau policy." Powell 3/19/08 Dep. at 26. In an October 4, 2005 e-mail to Powell, Complainant reiterated the illegality of Powell's birthday leave policy. Thayer 12/18/08 Declaration, Ex. 1 (indicating that the policy "is not only illegal[,] but it is Time and Attendance abuse"). In addition, the FBI readily acknowledges that there is no birthday leave policy, the concept was SSA Powell's "invention," and birthday leave was in violation of the FBI's leave policy manual. [redacted] Dep., Ex. 8 at 6 (11/18/05 EC); [redacted] Dep. at 44.

It is well-settled that T&A abuse is a violation of law, rule, or regulation, and that there is no de minimis exception for the violation-of-law aspect of the "protected disclosure" standard under 28 C.F.R. § 27.1(a). *See Grubb v. Dep't of the Interior*, 96 M.S.P.R. 377, ¶ 26 (2004); *DiGiorgio v. Dep't of the Navy*, 84 M.S.P.R. 6, ¶ 14 (1999). The evidence of record shows that Complainant provided SA [redacted] and SSA [redacted] with documentation regarding specific dates on which he claimed SSA Powell falsified his T&A records, based on the following:

Complainant's observations on those days where SSA Powell either signed in at 6 or 7 a.m., but arrived at the office much later, never arrived, worked less than a full shift, or went to a Bureau function; what Complainant heard about Powell's attendance from support staff and/or duty agents; and Complainant's own accounts of when he (Complainant) was in the office and Powell was not. [redacted] Dep., Ex. 5 (11/16/05 EC re: "Results of meetings with STIS Robert Kobus") at 2, 6. Based on Complainant's allegations of T&A abuse by Powell that were based, in part, on his own personal observations in his role as a senior support supervisor initially responsible for certifying staff T&A registers, we find that Complainant has proved that he reasonably believed that his disclosures to SSA [redacted] and OIG evidenced a violation of law, rule, or regulation. Kobus Aff., ¶¶ 23-24, Ex. DD (Complainant's 11/8/05 Memorandum to SSA [redacted] Dep., Ex. 5 (11/16/05 EC re: "Results of meetings with STIS Robert Kobus.") at 6-7. *See Grubb*, 96 M.S.P.R. 361, ¶ 12 (the appellant made specific allegations of T&A abuse that were based on her personal observations and supported by documentation).

It is undisputed that the birthday leave policy implemented by Powell permitted employees in the Ops Center to take time off for their birthdays, while recording a full day's work on their T&A registers. Powell Dep. at 13. Thus, Ops Center employees who availed themselves of birthday leave were conferred a benefit in the form of compensation for hours claimed, but not actually worked. Similarly, one could reasonably believe that, by falsifying his own T&A records, Powell himself would also receive the benefit of pay for hours not worked. Under these circumstances, a disinterested observer who knew what Complainant knew about Powell's birthday leave policy and other alleged T&A abuses could reasonably have concluded that Powell abused his authority by claiming and receiving – and allowing others to claim and receive – compensation for hours not actually worked. Accordingly, we find that Complainant proved that he had a reasonable belief that his disclosure regarding Powell's birthday leave and other T&A abuses evidenced an abuse of authority. *See Stiles v. Dep't of Homeland Sec.*, 116 M.S.P.R. 263, ¶ 17 (2011) ("An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.").

We conclude that Complainant proved by preponderant evidence that his disclosures to SSA [redacted] and OIG on October 12 and November 17, 2005, respectively, were protected within

the meaning of 28 C.F.R. § 27.1(a). Additionally, based on our finding above that SAC Morrow was a proper recipient of Complainant's October 6, 2005 disclosure, as well as our conclusion that Complainant proved that he reasonably believed that his disclosure to SSA [redacted] (which involved the same substantive allegations of T&A abuse by SSA Powell received by SAC Morrow on October 6, 2005) evidenced a violation of law, rule, or regulation, and an abuse of authority, we conclude that Complainant has likewise established that his disclosure to SAC Morrow on October 6, 2005, was protected within the meaning of 28 C.F.R. § 27.1(a).[10]

II. Complainant has established by preponderant evidence that his protected disclosures were a contributing factor to some, but not all, of the alleged personnel actions at issue.

We now consider whether Complainant's disclosures were a contributing factor to the personnel actions against him. The term "contributing factor" means any disclosure that affects an agency's decision to threaten, propose, take or not take a personnel action with respect to the individual making the disclosure. *See Usharauli v. Dep't of Health and Human Services*, 116 M.S.P.R. 383, ¶ 31 (2011). Complainant can prove that his disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the action had actual or "constructive," *i.e.*, imputed, knowledge of the protected disclosure and acted within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.[11] *See Stiles*, 116 M.S.P.R. 263, ¶ 20 (2011); *Chambers v. Dep't of*

[10] We note the FBI's argument that "Complainant's time and attendance disclosures are not entitled to any whistleblower protection, since they merely constituted 'disclosures made as part of [his] normal duties through normal channels.'" RCAF, Tab 141 (FBI's Surreply) at 2 (emphasis in original). Complainant, like all federal employees, is generally required to "disclose waste, fraud, abuse, and corruption to appropriate authorities," *see* 5 C.F.R. § 2635.101(b)(11). Here, reporting T&A misconduct by a supervisor (*i.e.*, SSA Powell) was not a part of Complainant's normal, assigned STIS duties. Kobus Aff., Ex. A. Therefore, Complainant's disclosures are not precluded from protection under 28 C.F.R. part 27. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1353-54 (Fed. Cir. 2001); *Kahn v. Dep't of Justice*, 528 F.3d 1336, 1342 (Fed. Cir. 2008) ("[A] disclosure comes within the third category of *Huffman* [(*i.e.*, disclosures outside of normal duties)] if, although the employee, like all agency employees, is generally required to report wrongdoing that he or she sees, the disclosure is not part of the employee's assigned duties.").

[11] The contributing factor standard applied by OARM at the jurisdictional phase of proceedings in this case was different, and more permissive, than the standard used by the Board. Specifically, at the time of OARM's October 3, 2007 jurisdictional determination, the standard was that circumstantial evidence could include evidence that the official taking the personnel action knew

Interior, 116 M.S.P.R. 17, ¶ 27 n.8 (2011) (even if an official who took a personnel action was unaware that the affected employee had made a whistleblowing disclosure, the employee can establish that her disclosure contributed to the action by showing that the official who took the action was influenced by someone who was aware of the disclosure). Thus, circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, *prima facie*, that the disclosure was a contributing factor to the personnel action. *See Horton v. Dep't of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995).

Under 28 C.F.R. § 27.2(b), a "personnel action" means any action described in clauses (i) through (xi) of 5 U.S.C. § 2302(a)(2)(A). At the time Complainant filed his RCA, the list of personnel actions in 5 U.S.C. § 2302(a)(2)(A) included: (i) an appointment; (ii) a promotion; (iii) an adverse action under chapter 75 of title 5, United States Code, or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of title 5, United States Code; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions. Pursuant to the Whistleblower Protection Enhancement Act (WPEA), signed into law by the President on November 27, 2012, and effective December 27, 2012, clause (xi) is redesignated as clause (xii), and clause (xi) adds "the implementation or enforcement of any non-disclosure policy, form, or agreement" to the list of personnel actions under § 2303(a)(2)(A).

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of Complainant's protected disclosure *or* that the personnel actions occurred within a period of time such that a reasonable person could conclude that his disclosures were a contributing factor in the contested personnel actions. Pursuant to the Department's January 9, 2008 final rule, *see supra* n.8, the Department made a technical correction to 28 C.F.R. § 27.4(e)(1), so that the contributing factor standard in that provision was consistent with 5 U.S.C. § 1221(e)(1) (*i.e.*, circumstantial evidence of a contributing factor includes evidence that the official taking the personnel action knew of the protected disclosure *and* the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action). *See* 73 FR 1493-02. This technical amendment does not affect our decision in this case, since, as demonstrated below, we find that Complainant proved both the knowledge and timing prongs of the contributing factor standard by preponderant evidence.

The alleged personnel actions at issue in this case include the FBI's decision to: (1) remove Complainant's use of his assigned Bureau car on October 19, 2005; (2) reassign Complainant from his STIS position in the Ops Center to the Occupational Safety Officer position on a largely vacant floor, effective October 30, 2005 (and extend that position to November 2006 and temporarily reassign Complainant to the Physical Security Specialist position from November 12, 2006, until January 2008); (3) threaten to deny Complainant's use of military leave in October 2005, and, again, in January 2006; (4) verbally abuse and harass Complainant, ban him from the Ops Center on March 2 and September 19, 2006, and otherwise subject him to a hostile work environment; and (5) deny Complainant's applications for the GS-14 Acting and Permanent AO positions.

A. Complainant has established by preponderant evidence that ASAC [redacted] SAC Morrow, and ADIC Mershon knew of his protected disclosures.

We find that the evidence of record shows that ASAC [redacted] knew of Complainant's October 6, 2005 protected disclosure to SAC Morrow on October 11, 2005. According to ASAC [redacted] she first received Complainant's October 6, 2005 e-mail to SAC Morrow on October 11, 2005, after she returned from leave and "the three-day weekend." [redacted] Dep., Ex. 20 ([redacted] 6/5/06 Aff.), ¶¶ 16, 21. SAC Morrow instructed ASAC [redacted] to follow up with SSA [redacted] to obtain the details on Complainant's T&A fraud allegations against SSA Powell. Upon receipt of Complainant's October 6, 2005 allegations, [redacted] 'immediately discussed [them] with SSA [redacted][,]" and advised Morrow accordingly. *Id.*, ¶¶ 21, 23. SSA [redacted] confirmed in her deposition testimony that ASAC [redacted] forwarded Complainant's October 6, 2005 allegations to her via e-mail on October 11, 2005. [redacted] Dep. at 16. That same day, on October 11, 2005, at 6:04 p.m., ASAC [redacted] e-mailed Complainant, [redacted] and Morrow, advising Complainant that [redacted] would be contacting him about the "six days" he alleged SSA Powell signed in and never came into the office. [redacted] Dep. at 16-18, Ex. 4.

As noted above, SSA [redacted] contacted Complainant via telephone on October 12, 2005, to "elicit from [Complainant] specific dates that he alleged that SSA Powell falsified his time and attendance register." [redacted] Dep., Ex. 8 (11/18/05 EC); Kobus Aff., ¶¶ 37-40, Ex. V (10/14/05 e-mail from SSA [redacted] to Complainant confirming a "discussion of Wednesday evening" (*i.e.*, October 12, 2005)). SSA [redacted] testified that she never discussed her October 12, 2005 telephone call with Complainant with [redacted] or Morrow. [redacted] Dep. at 21. In her deposition testimony,

ASAC [redacted] claimed that "[she] didn't know that there was a time and attendance disclosure to [SSA [redacted] on October 12." [redacted] Dep. at 85, 108.

Weighing against that evidence, however, is the evidence showing that, on October 11, 2005, [redacted] specifically instructed [redacted] to follow-up with Complainant regarding his T&A allegations against SSA Powell, as well as [redacted] additional testimony that, between October 12 and October 24, 2005, she had "one or two very short conversations" with SSA [redacted] about SSA [redacted] unsuccessful attempts to meet with Complainant about the six days he alleged SSA Powell committed T&A abuse in his October 6, 2005 e-mail to Morrow. *Id.* at 87-88, 106, 111-114; Ex. 20 ([redacted] 6/5/06 Aff.), ¶ 48; *see also* [redacted] Dep., Ex. 3 ([redacted] 10/28/05 e-mail to Complainant, Morrow, [redacted] *et al.*, regarding [redacted] unsuccessful attempts to meet with Complainant to obtain the specific dates on which Powell allegedly "bang[ed] the books"). From this, we find unpersuasive ASAC [redacted] assertions that she had no knowledge of any disclosure by Complainant to SSA [redacted] involving his T&A abuse allegations against SSA Powell. *See McCarthy*, 116 M.S.P.R. 594, ¶ 41 (although there was no evidence in the record that the official taking the personnel action knew the details of the appellant's disclosure, the fact that the appellant told the official that he had made the disclosures was sufficient to establish the "knowledge" element of the knowledge/timing test.); *Rubendall v. Dep't of Health & Human Services*, 101 M.S.P.R. 599, ¶ 11 (2006) (to prove that a disclosure was a contributing factor in a personnel action, Complainant need only demonstrate that *the fact of*, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way). We find the circumstantial evidence of record sufficient to conclude that it is more likely than not that ASAC [redacted] knew about Complainant's October 12, 2005 disclosure to SSA [redacted] at the very latest, by October 24, 2005.

SAC Morrow first learned of Complainant's disclosure on October 6, 2005, the date on which he acknowledged receipt of Complainant's e-mail outlining his allegations of T&A abuse by SSA Powell. [redacted] Dep., Ex. 4. We also find, as we did above with respect to ASAC [redacted] knowledge of Complainant's October 12, 2005 disclosure to SSA [redacted] that a preponderance of the circumstantial evidence of record is sufficient to conclude that SAC Morrow likewise knew about Complainant's October 12, 2005 disclosure to SSA [redacted] By October 11, 2005, SAC Morrow knew that SSA [redacted] would be contacting Complainant to discuss

Complainant's allegations of T&A abuse by SSA Powell, including the very same content disclosed to SAC Morrow in Complainant's October 6, 2005 e-mail. [redacted] Dep. at 16-18, Ex. 4 [redacted] 10/11/05 e-mail to Complainant, Morrow, and [redacted] Further, ASAC [redacted] testified that it was her normal practice to meet with SAC Morrow twice daily to talk about Ops Center issues, once in the morning and again at the end of the day. [redacted] Dep. at 68-69. Given SAC Morrow's directive that [redacted] follow up with SSA [redacted] regarding Complainant's T&A allegations involving Powell, and [redacted] statement that she had done so; Morrow's knowledge that [redacted] would be contacting Complainant to discuss the T&A allegations against Powell raised in his October 6, 2005 e-mail; [redacted] conversations with SSA [redacted] about [redacted] unsuccessful attempts to obtain specific information from Complainant regarding the six days purportedly at issue; and ASAC [redacted] and SAC Morrow's frequent daily contact with one another as managers, we find it more likely than not that [redacted] and Morrow discussed Complainant's disclosure to SSA [redacted]

With respect to Complainant's November 17, 2005 disclosure to OIG, ASAC [redacted] testified that, on that same day, ADIC Mershon advised her that Complainant had filed a whistleblower allegation with OIG, and she was to have "no further dealings" with Complainant in light of his complaint to OIG. [redacted] Dep. at 48, 73, 147. According to ASAC [redacted] pursuant to ADIC Mershon's directive, she effectively stopped supervising Complainant on November 17, 2005. *Id.* at 73. ADIC Mershon testified that he first learned of Complainant's disclosure to OIG when Complainant came to his office and presented him with a copy of his November 17, 2005 letter to OIG. Mershon Dep. at 17, 21. Although ADIC Mershon was unable to recall during his deposition the date on which Complainant presented the letter to him, his handwritten notes of record show that it was on December 12, 2005. *Id.*, at 17; Thayer 12/18/08 Declaration, Ex. 12. Around that time, ADIC Mershon met with SAC Morrow, ASAC [redacted] SSA [redacted] and SAC Frahm, and cautioned them not to aggravate the situation and to be "very, very careful of the appearance of any actions such that they not be subject to interpretation as retaliation [or] retribution." Thayer 12/18/08 Declaration, Ex. 12[12]; Mershon Dep. at 21-23. Additional evidence of record shows that, via a December 13, 2005 EC drafted by SSA [redacted] and

[12] Although the specific date of ADIC Mershon's handwritten note of record documenting the meeting was partially redacted, based upon close review, it appears the date of his meeting with Morrow, [redacted] and Frahm was on Wednesday, December 14, 2005. *Id.*

approved by SAC Morrow and ASAC [redacted] FBI-INSD was notified of Complainant's November 18, 2005 letter to OIG and his allegations of T&A abuse by SSA Powell. [redacted] Dep., Ex 7. Based on the evidence of record, we find that SAC Morrow and ASAC [redacted] knew of Complainant's November 17, 2005 disclosure to OIG, at the very latest, by December 13, 2005.

B. Complainant has established by preponderant evidence that his protected disclosures were a contributing factor to the FBI's decision to take away his Bureau-issued vehicle, reassign him from his STIS position, threaten to deny his requests for military leave, and deny his application for the GS-14 Acting AO position.

The FBI's decision to take away Complainant's assigned Bureau vehicle on October 19, 2005, is a covered personnel action under 5 U.S.C. § 2302(a)(2)(A)(ix) as a decision concerning a benefit of employment (*i.e.*, use of an assigned FBI vehicle). Furthermore, the record evidence shows that SAC Morrow made the decision to take away Complainant's Bureau car, and SSA Powell directed agents to retrieve the car from Complainant's home, within days of Complainant's protected disclosures to him (Morrow) and SSA [redacted] on October 6 and October 12, 2005, respectively.[13] OIG's ROI, Ex. 30 (OIG's 5/31/06 MOI of Morrow) at 2; [redacted] Dep. at 171, Ex. 20 ([redacted] 6/5/06 Aff.), ¶¶ 28-29, 33. This is sufficiently close in time to satisfy the knowledge-timing test. *See Peterson v. Dep't of Veterans Affairs*, 116 M.S.P.R. 113, ¶ 16 (2011) (the knowledge-timing test is satisfied where the disclosure and personnel action are only 1 to 2 years apart); *Rubendall*, 101 M.S.P.R. 599, ¶ 13 (an interval of less than 6 months between the disclosure and the personnel action was sufficiently proximate to satisfy the knowledge/timing test).

[13] SAC Morrow told OIG that he advised SSA [redacted] to transfer Complainant's Bureau vehicle to another support employee in the firearms unit. OIG's ROI, Ex. 30 (OIG's MOI 5/31/06 Interview of Morrow) at 2. SSA [redacted] testified during his deposition that SAC Morrow told him to transfer the car, but, because he was not Complainant's supervisor at the time, he directed SSA Powell to handle the matter. [redacted] Dep. at 68-70. SSA Powell, on the other hand, testified that he received the directive to take away Complainant's Bureau car directly from SAC Morrow. Powell Dep. at 118-119; OIG ROI, Ex. 33 (Powell 9/13/06 Aff.) at ¶ 48; Kobus Aff., Ex. W (SSA Powell's 10/17/05 e-mail to Ops Center staff involving "money matters" and "gas budget"). ASAC [redacted] testified that Morrow had told her that he had advised Powell that Complainant's car was being reassigned. [redacted] Dep. at 171. Whether Morrow directed Powell or [redacted] to take away Complainant's vehicle does not affect on our analysis of this issue, as the evidence is clear that it was ultimately Morrow who made the decision to take the personnel action.

Complainant's October 30, 2005 reassignment from his STIS position in the Ops Center to the position of Occupational Safety Officer on the largely abandoned 24th floor of 26 Federal Plaza is a covered personnel action in two categories under 5 U.S.C. § 2302(a)(2)(A) – *i.e.*, a "detail, transfer, or reassignment" under § 2302(a)(2)(A)(iv) and a "significant change in duties, responsibilities, or working conditions" under § 2302(a)(2)(A)(xii).[14] Although ASAC [redacted] notified Complainant of his reassignment to the Occupational Safety Officer position on October 24, 2005, the record evidence shows that it was SAC Morrow who was the reassigning authority and the ultimate decision-maker on Complainant's reassignment (and extensions of that reassignment). [redacted] Dep. at 69-70, 79-80, Ex. 20 ([redacted] 6/5/06 Aff.), ¶ 30; [redacted] Dep. at 22-23, 33. The timing of Complainant's reassignment from the Ops Center to the Occupational Safety Officer position (and subsequent extensions and transfer to the Physical Security Specialist position in November 2006 (and subsequent extensions to November 2007)) and SAC Morrow's and ASAC [redacted] knowledge of Complainant's protected disclosures are close enough in time to support an inference of reprisal.[15] *See Peterson*, 116 M.S.P.R. 113, ¶ 16; *Gonzalez v. Dep't of Transportation*, 109 M.S.P.R. 250, ¶ 20 (2008) (finding that a time period of slightly more than 1

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[14] "The [FBI] does not dispute that a reassignment can constitute a personnel action." *See* RCAF, Tab 133 (FBI's Merits Brief) at 5. Further, early on in proceedings before OARM, both parties agreed that Complainant's claim regarding his relocation to the 24th floor of 26 Federal Plaza should be considered part of his reassignment claim. RCAF, Tab 27 (Complainant's 5/15/07 Brief) at 22-23; RCAF, Tab 29 (FBI's 5/21/07 Surreply) at 13. This does not, however, preclude the facts underlying that claim from being assessed in OARM's analysis of the merits of Complainant's hostile work environment claim, as set forth below.

[15] ASAC [redacted] testified that, by September 12, 2005 (the day she learned the Ops Center would be moved under the Admin Div), she and SAC Morrow had *discussed* transferring both Complainant and SSA Powell on a TDY 119-day basis, during which time they believed they would have an independent audit conducted of the proper structure of, and positions for, the Ops Center. [redacted] Dep. at 51-52, 65-67, Ex. 20 ([redacted] 6/5/06 Aff.), ¶¶ 7, 17, 18, 67. [redacted] also told OIG that she had advised Complainant on October 24, 2005, that he was being reassigned for 119 days while "an independent audit of the work load and job description/duties would be conducted." *Id.*, Ex. 20 ([redacted] 6/5/06 Aff.), ¶¶ 32, 67. However, there is nothing in the record documenting any September 2005 discussions between [redacted] and Morrow related to transferring SAC Powell and Complainant and no audit of the Ops Center was ever scheduled or conducted. *Id.* at 142. Regardless, even if SAC Morrow and ASAC [redacted] had discussed transferring Complainant and SSA Powell prior to Complainant's protected disclosures, it is clear that they *decided* to effect Complainant's (*and not* SSA Powell's) reassignment *after* his protected disclosures on October 6 and October 12, 2005.

year satisfied the knowledge-timing test).

ASAC [redacted] and SSA [redacted] attempts to deny Complainant's requests for military leave in October 2005 and January 2006 for his IDT are personnel actions under 5 U.S.C. § 2302(a)(2)(A)(ix) as threats to deny Complainant a benefit of employment (*i.e.*, military leave under 5 U.S.C. § 6323(a)).[16] ASAC [redacted] knew of Complainant's October 6, 2005 disclosure to SAC Morrow on October 11, 2005, and threatened to deny his request for military leave via e-mail that same day, when she notified him that his leave would not be authorized absent military orders. [redacted] Dep., Ex. 11.[17] Thus, Complainant has established the knowledge-timing prong with respect to ASAC [redacted] threat to deny his military leave. With respect to SSA [redacted] it is unclear whether SSA [redacted] was aware of Complainant's protected disclosures when he decided to initially deny Complainant's request for military leave in January 2006.[18] However, a complainant can show that a protected disclosure was a contributing factor by proving

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[16] The FBI asserts that, since Complainant was ultimately allowed to take military leave, he "suffered no harm" and, therefore, his claim does not involve a covered "personnel action." RCAF, Tab 133 (FBI's Merits Brief) at 11; RCAF, Tab 141 (FBI's Surreply) at 4. To the contrary, however, Complainant's claim of a threatened denial of military leave is not rendered moot by the fact that the FBI ultimately granted his requests for such leave. *See, e.g., Vick v. Dep't of Transportation*, 118 M.S.P.R. 68, ¶ 5 (2012) (even though the agency rescinded the personnel action at issue, the appellant's outstanding claims for consequential damages and corrective action precluded dismissal of his individual right of action appeal as moot).

[17] As noted above, by e-mail dated October 11, 2005, at 6:04 p.m., ASAC [redacted] advised Complainant that SSA [redacted] would be contacting him about the allegations in his October 6, 2005 e-mail to SAC Morrow. [redacted] Dep., Ex. 4. On October 11, 2005, at 6:11 p.m., ASAC [redacted] advised Complainant that his request for military leave would not be authorized until he presented military orders. *Id.*, Ex. 11.

[18] SSA [redacted] disclaimed knowledge of Complainant's disclosure to SSA [redacted] [redacted] Dep. at 103. With respect to any knowledge of Complainant's disclosure to OIG by SSA [redacted] we note that, when asked during his deposition whether, during the time he was supervising Complainant, he learned that Complainant had made "some complaints to OIG," SSA [redacted] testified that Complainant came to him "one day" and advised him that he would not be into work because he was speaking with OIG; however, SSA [redacted] could not recall when that happened, and he further testified that he did not talk to anyone about any complaint Complainant made to OIG. *Id.* at 102. Preponderant evidence supports that SSA [redacted] was aware of the content of Complainant's protected disclosures, at the latest, by November 7, 2005, at which time SAC [redacted] met with [redacted] and Complainant "to obtain specific dates that [Complainant] alleged that Willy Powell committed time and attendance fraud." [redacted] Dep. at 29; [redacted] Dep. at 115; [redacted] Dep. at 54.

that the acting official was influenced by an individual with actual knowledge of the disclosure. *See Chambers*, 116 M.S.P.R. 17, ¶ 27 n.8; *Marchese v. Dep't of the Navy*, 65 M.S.P.R. 104, 108-109 (1994). Here, the evidence shows that ASAC [redacted] who, as discussed previously, had knowledge of Complainant's protected disclosures to SAC Morrow, SSA [redacted] and OIG prior to the action taken by SSA [redacted] influenced SSA [redacted] decision to initially deny Complainant's request for military leave, by advising [redacted] that Complainant was required to produce military orders in order for SSA [redacted] to grant Complainant's request. [redacted] Dep. at 62-64. Therefore, we find that Complainant has proved by preponderant evidence that [redacted] had imputed knowledge of his protected disclosures and acted within a period of time such that a person could conclude that the disclosures were a contributing factor in [redacted] decision to initially deny Complainant's request for military leave.

SAC Morrow's decision to not select Complainant for the Acting AO position in or around July 2006, by having ASAC [redacted] cancel the vacancy announcement for the position after the incumbent Acting AO [redacted] agreed to stay in the position, constitutes a personnel action under 5 U.S.C. § 2302(a)(2)(A)(ii).[19] *See Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323, 1325-1327 (Fed. Cir. 2006) (applicant's nonselection for a position for which the vacancy announcement is ultimately cancelled is a "failure to take a personnel action" ("to wit, an 'appointment'") within the Whistleblower Protection Act). Further, the action took place within one year of SAC Morrow's knowledge of Complainant's protected disclosures, which is sufficiently close in time to support an inference of reprisal. *See Cassidy v. Dep't of Justice*, 118 M.S.P.R. 74, ¶ 15 (2012) (the time between the appellant's disclosure and his nonselection was approximately 8 months).

Based on the written evidence of record, we find that Complainant has established by preponderant evidence that his protected disclosures were a contributing factor to the FBI's decision to take away his Bureau assigned vehicle, reassign him from his STIS position, threaten to deny his requests for military leave, and to not select him for the Acting AO position.

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[19] ADIC Mershon testified that SAC Morrow was the official in control of filling the Acting AO position. Mershon Dep. at 53.

C. Complainant has established by preponderant evidence that his protected disclosures were a contributing factor in the FBI's decision to subject him to a hostile work environment that caused a significant change to his duties, responsibilities, or working conditions.

Where a complainant alleges that he was subjected to a hostile work environment in retaliation for his protected disclosures, such work environment, although not specifically enumerated as a "personnel action" under 5 U.S.C. § 2302(a)(2)(A), may, in certain circumstances, constitute a "significant change in duties, responsibilities, or working conditions," and, therefore, a "personnel action" covered by 28 C.F.R. § 27.2(b). *See* 5 U.S.C. § 2302(a)(2)(A)(xii). The relevant inquiry is based on whether Complainant can establish that his duties, responsibilities, or working conditions, changed in a *significant* way; the name or label designated to describe a particular set of facts (*e.g.*, hostile work environment, harassment, etc.) is irrelevant. Claims of a "hostile work environment" are decided on a case-by-case basis to determine if they fall within the parameters of 5 U.S.C. § 2302(a)(2)(A). *See Shivaee v. Dep't of the Navy*, 74 M.S.P.R. 383, 388 (1997). The legislative history suggests that the "any other significant change in duties, responsibilities, or working conditions" provision in § 2302(a)(2)(A) should be interpreted broadly, and that "personnel action" is intended to include "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system." *See Roach v. Dep't of the Army*, 82 M.S.P.R. 464, ¶ 24 (1999) (discussing the 1994 amendments to the WPA, and citing to 140 Cong. Rec. H11,421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey)).

Complainant asserts that ADIC Mershon, SAC Morrow, ASAC [redacted] and SSA [redacted] collectively took a number of actions against him that subjected him to a hostile work environment that caused a significant change to his duties, responsibilities, or working conditions, including: reassigning him to the Occupational Safety Officer position on the largely abandoned 24th floor of the FBI's offices at 26 Federal Plaza, and keeping him there despite his requests for an alternate office location; verbally abusing and harassing him during a series of meetings held between October 24 and November 10, 2005; banning him from entering the Ops Center, after his transfer to the Occupational Safety Officer position; and berating him for taking a tour group through the Ops Center and for failing to complete an Occupational and Safety Environmental report. RCAF, Tab 127 (Complainant's Merits Brief) at 14-17, 21-24, 51-53; 61-63.

The evidence of record shows that on November 3, 2005, when Complainant reported to his new "TDY" position as Occupational Safety Officer, SSA [redacted] escorted him to his new work location on the 24th floor of the FBI's offices at 26 Federal Plaza. [redacted] Dep. at 42-43, 104-106; Kobus Aff., ¶ 56. Complainant described the work location and his reaction thereto, as follows:

> I was shocked by the deplorable condition of that portion of the 24th Floor to which I had been assigned . . . . The room, which was extremely large (approximately the size of one New York City block), had been abandoned by a prior FBI squad. It contained approximately 130 empty desks and I was the only employee assigned to this room. None of the empty desks had telephones or computers and most were cluttered with garbage and debris left by the prior squad. Most of the lighting fixtures were inoperable, leaving much of the room dark and the rest of it poorly lit.
>
> [redacted] told me that my work station on this abandoned floor was the reception desk in the front of the room. The reception desk and the area surrounding the desk were covered in garbage and debris . . . . There were also numerous wires protruding from the floor directly beneath the reception desk. I requested permission to use the small empty office situated behind the reception desk, but [redacted] refused to permit me to use this office and insisted that I had to sit at the reception desk in the front of the room.
>
> [redacted] did not offer me the opportunity to work at any other location. At this point I was convinced that I had been consigned to sit at a reception desk on an abandoned floor as punishment for making my complaints about Powell's misconduct to Morrow and FBI-OPR, and I said nothing further to [redacted] for fear that matters could get worse.
>
> A few days later, I learned that there were several empty desks available outside of [redacted] office on the 28th Floor. I asked [redacted] for permission to move to one of these desks. [redacted] without any explanation, denied me permission to use these desks.

Kobus Aff., ¶¶ 57-60.[20] Pictures taken by Complainant in December 2005 show that the work space appeared, in large part, as he described. *Id.*, Ex. AA.

During his deposition, ADIC Mershon, who had visited Complainant at his work location

[20] SSA [redacted] confirmed that Complainant had requested an office, but claims to have explained to Complainant that "not everybody is provided an office and that currently at the time there wasn't an office to give him rather than put him in just a general pod." [redacted] Dep. at 42-43. According to SSA [redacted] he was "trying to be nice" when he assigned Complainant to the larger reception area with a "huge desk." *Id.*

on the 24th floor several times, offered his description of the work area:

> I would describe it as two distinct sides of the floor. The side of the floor that [Complainant] was on, he was in a work pod so to speak. What do you call those work stations? Not a stand alone office, but a work station, very close to the door opening to the half of the floor. And the rest of the half of the floor or most of it were [sic] work stations that had been abandoned.

Mershon Dep. at 37. SSA [redacted] provided a similar description of Complainant's work area on the 24th floor. [redacted] Dep. at 106-112. Specifically, according to SSA [redacted] there were two sides to the floor and, on the side of the floor opposite from Complainant, there was a "full squad" made up of, "at bear [sic] minimum . . . three or four," "maybe six and eight, maybe nine people disbursed all the way to the right working on things, working on different matters." *Id.* at 106, 110. Among that squad sat "at least 100" empty desks. *Id.* at 108. SSA [redacted] confirmed that Complainant would not be able to see the people on the other side of the floor, "unless he went to the bathroom or something." *Id.* at 112.[21]

Despite the fact that Complainant apparently voiced his concerns regarding his work location on the 24th floor, no one – not ADIC Mershon, ASAC [redacted] nor SSA [redacted] took any steps to address his concerns or rectify the situation by moving him to an alternate location with an office, until October 2006, when [redacted] approved Complainant's request to relocate his work location to an office at an FBI building at 290 Broadway. Kobus Aff., ¶¶ 110-112, Ex. WW; [redacted] Dep. at 48.[22]

The evidence shows that, during a November 9, 2005 meeting between Complainant,

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[21] According to ASAC [redacted] she had visited Complainant at his work location on the 24th floor sometime in "late January early February [2006.]" [redacted] Dep. at 36-38. She testified that Complainant initially had an office; however, he eventually ended up sitting at a reception desk, with approximately a "[c]ouple hundred" unoccupied pods on the same floor. *Id.* at 37-38.

[22] On September 21, 2006, Complainant requested permission from SSA [redacted] to relocate to one of the empty desks at 290 Broadway. Kobus Aff., ¶ 111, Ex. WW. According to Complainant, [redacted] refused and, instead, insisted that Complainant move to a "confined space on the 32nd Floor," where Complainant "was required to share a desk with several other FBI employees, who were several grades lower than [him]." *Id.*, ¶ 111. After Complainant made yet another request to move, SSA [redacted] moved him to an empty desk at 290 Broadway. *Id.*, ¶ 112. According to SSA [redacted] before Complainant's relocation to 290 Broadway, he was required to move Complainant to the area of the "facilities management offices" because, at the time, the 24th floor was needed to house employees involved in the October 2006 inspection of the NYFO. [redacted] Dep. at 48.

ASAC [redacted] and SA [redacted]

> ASAC [redacted] addressed [Complainant's] concerns that he had been demoted, and moved from his position of multiple years in the Operations Center, to a 'dirty office' and assigned to a job at which he had no experience and had his Bureau car taken away. ASAC [redacted] advised that the reality of the situation is that [Complainant] is not performing GS-13 work in the Operations Center, and was moved to a position that supports a Grade-13 salary. This position is not performed within the OPC [(Ops Center)], and [Complainant] was assigned to available space that had been recently vacated by [another] squad . . . .

[redacted] Dep., Ex. 8 (11/18/05 EC) at 7. When asked during her deposition what, if anything, she did to address Complainant's concern voiced in the meeting that he was assigned to a dirty office, ASAC [redacted] responded: "I either missed it or didn't pay attention to it. I didn't address it at all. I addressed when he was talking specifically about his demotion." *Id.* at 153. SA [redacted] confirmed that Complainant "told [redacted] about his dirty office," and further testified that [redacted] responded to Complainant's complaints about his office space by explaining that his new Occupational Safety Officer position was not housed in the Ops Center and telling him "you go where your job is[.]" [redacted] Dep. at 53, 57; Kobus Aff., ¶ 74. ADIC Mershon testified that he visited Complainant on the 24th floor on several occasions for a "morale check," during which he found Complainant to be of "lowered spirits." Mershon Dep. at 39-41.[23] Although SSA [redacted] told OIG, and also testified during his deposition, that Complainant never complained about his assignment to the 24th floor, he also told OIG that, during a November 2005 meeting with ASAC [redacted] SSA [redacted] and Complainant, Complainant had told him that he was "not happy about being moved." OIG's ROI, Ex. 23 (OIG's MOI of 6/29/06 Interview of [redacted] at 2; [redacted] Dep. at 43-44, 47,105.

Complainant's reassignment to an isolated work space on the largely abandoned 24th floor with no assurance from management that his complaints regarding the location would be addressed or that his situation would change certainly changed his working conditions in the Ops Center (where he had an office and worked among agents and support staff) in a significant way, and, additionally, could be interpreted as having a "chilling effect" on whistleblowing.[24] *Cf.*,

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[23] According to ADIC Mershon, the purpose of a "morale check" was to check in on "someone who is going through . . . an emotionally trying time" and, in Complainant's case, to "let him know [he] was thinking about him" and to see how he was doing. *Id.* at 41.

[24] We note the evidence showing that several employees were intimidated by Complainant's move

Shivaee, 74 M.S.P.R. at 388-89 (without more, the appellant's "mere assertion that he was moved to another location" did not, "even under a broad interpretation, show a 'significant' change in working conditions"). Further, Complainant's reassignment to the 24th floor and his continued assignment at that location, until October 2006, took place within approximately one year of Complainant's protected disclosures to SAC Morrow, SSA [redacted] and OIG, which is sufficiently close in time to infer reprisal. *See Gonzalez*, 109 M.S.P.R. 250, ¶ 20.

We find – even absent consideration of Complainant's additional allegations underlying this claim – that Complainant has proved by preponderant evidence that his protected disclosures were a contributing factor in the FBI's decision to subject him to a hostile work environment.

D. Complainant has failed to prove by preponderant evidence that his protected disclosures were a contributing factor to the FBI's decision to not select him for the permanent GS-14 AO position.

Complainant's nonselection for the permanent GS-14 AO position is a covered personnel action under 5 U.S.C. § 2302(a)(2)(A)(ii). *See Miller v. Dep't of Homeland Security*, 99 M.S.P.R. 175, ¶ 17 (2005) ("A nonselection for a promotion is a 'personnel action' under 5 U.S.C. § 2302(a)(2)(A)(ii)."). However, we find that Complainant has failed to establish by preponderant evidence that his protected disclosures were a contributing factor to his nonselection.[25]

The evidence of record shows that Complainant electronically transmitted his application for the permanent GS-14 AO position via "the FBIjobs Online Application System" on July 21, 2006. RCAF, Tab 24 (Complainant's 4/23/07 Jurisdictional Statement), Ex. 3C. The FBI's point of contact listed on the vacancy announcement was a member of the FBI's Administrative

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to the 24th floor and/or believed the action was retaliatory. For example, [redacted] (the SSA of the Ops Center prior to SSA Powell) reported to OIG that he agreed that the actions taken against Complainant appeared to be retaliatory, citing as "[t]he clearest example," Complainant's move to "an unoccupied floor." OIG's ROI, Ex. 10 (OIG's MOI of 1/26/06 Interview of [redacted] at 1, 5. STIS [redacted] told OIG she was intimidated by the way Complainant had been treated (citing, among other thing, the fact that Complainant's former office in the Ops Center was turned into the "William S. [Powell] Conference Room" after his TDY to the 24th floor). *Id.*, Ex. 31 (OIG's MOI of 1/27/06 Interview of [redacted]) at 3. In addition, Technical Information Specialist [redacted] reported to OIG that he had heard rumors that Complainant's "TDY to a floor by himself was a 'punishment.'" *Id.*, Ex. 46 (OIG's MOI of 3/8/06 Interview of [redacted] at 2.

[25] Complainant makes little effort arguing the merits of his claim involving his nonselection for the permanent GS-14 AO position; rather, his focus is on the Acting AO position. RCAF, Tab 127 (Complainant's Merits Brief) at 24, 58-60.

Services Division/HRMS/Staffing Unit, [redacted] located at FBIHQ. *Id.* By e-mail dated August 2, 2006, [redacted] notified Complainant that his "application was not referred to the selecting official for further consideration because [he] [was] not among the best qualified." Kobus Aff., Ex. UU.

ASAC [redacted] testified during her deposition that, during the time that she supervised Complainant, she was not aware that he had made an application for the permanent GS-14 AO position. [redacted] Dep. at 53-54. [redacted] explained that applications for jobs made through a posted vacancy announcement, such as the permanent GS-14 AO position, "go directly to headquarters." *Id.* at 54. When questioned as to why she would not have been alerted as to who had applied for the position, which was in her branch at the time (*i.e.*, Branch A), she testified that hiring is a headquarters' personnel function. *Id.* According to [redacted] FBIHQ would receive the applications, a board would convene to review the applications to come up with a "best qualified list" that would then be shared with the Division, and she (and SAC Morrow) would initiate the interviews and conduct a "meet and greet" with those categorized as "best qualified." *Id.* at 54-55.

FBIHQ, via [redacted] received Complainant's application and advised him that his application was not forwarded to the selecting official for further consideration, as he was not among the best qualified candidates. Nowhere has Complainant alleged or established that [redacted] or anyone otherwise involved in receiving or reviewing his application or the permanent GS-14 AO position had knowledge, either actual or constructive, of his protected disclosures. Therefore, we find that Complainant has failed to establish by preponderant evidence that his protected disclosures were a contributing factor in the FBI's decision to not select him for the permanent GS-14 AO position. *See, e.g., Johnson v. Dep't of Defense*, 95 M.S.P.R. 192, ¶ 10 (2003) (the appellant failed to make a nonfrivolous allegation that her disclosures were a contributing factor in the agency's decision to terminate her, precluding Board jurisdiction over her individual right of action reprisal appeal, where she failed to allege that either the agency official who proposed her termination, or the official she conferred with in reaching her decision to terminate the appellant, knew of the appellant's disclosures).

III. The FBI has not shown by clear and convincing evidence that it would have taken the personnel actions against Complainant in the absence of his protected disclosures.

Because Complainant has proved the merits of his RCA by preponderant evidence, the burden now shifts to the FBI to establish by clear and convincing evidence that it would have taken the personnel actions against him in the absence of his protected disclosures. *See* 28 C.F.R. § 27.4(e)(2). Clear and convincing evidence is "that measure of degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." *See Fulton v. Dep't of the Army*, 95 M.S.P.R. 79, ¶ 9 (2003) (quoting 5 C.F.R. § 1209.4(d)). The "clear and convincing evidence" standard is a high burden of proof for the Government – here, the FBI – to carry, as intended by Congress for two reasons:

> First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was 'tainted.' Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.

Whitmore v. Dep't of Labor, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (citing, 135 Cong. Rec. H747-48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20)).

In determining whether the FBI has shown by clear and convincing evidence that it would have taken the same personnel actions in the absence of Complainant's whistleblowing, OARM will consider all of the relevant factors, including the strength of the FBI's evidence in support of its actions, the existence and strength of any motive to retaliate on the part of the officials involved in the decision, plus any evidence that the FBI took similar actions against employees who are not whistleblowers, but who are otherwise similarly situated to Complainant. *See Parikh v. Dep't of Veterans Affairs*, 116 M.S.P.R. 197, ¶ 36 (2011); *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). *Carr* does not, however, impose an affirmative burden on the agency to produce evidence with respect to each and every one of the three *Carr* factors to weigh them each individually in the agency's favor. *Whitmore*, 680 F.3d at 1374. The factors are merely appropriate and pertinent considerations for determining whether the agency carries its

burden of proving by clear and convincing evidence that the same action would have been taken absent the whistleblowing. *Id.* OARM does not view these factors as discrete elements, each of which the agency must prove by clear and convincing evidence. Rather, OARM will weigh the factors together to determine whether the evidence is clear and convincing as a whole. *See McCarthy*, 116 M.S.P.R. 594, ¶ 44.

Nowhere in its submissions on the merits in this case does the FBI cite to the *Carr* factors or refer to its administrative burden of proving by "clear and convincing evidence" that it would have taken the same personnel actions against Complainant in the absence of his disclosures, despite the fact that OARM put the parties on notice of their respective burdens of proof at the merits stage of these proceedings in its October 3, 2007 jurisdictional Opinion and Order. RCAF, Tab 37 at 27-28; RCAF, Tabs 133, 141; *see also* 28 C.F.R. § 27.4(e)(2). Regardless, based upon the written evidence of record, we address the *Carr* factors, in turn, below.

A. Strength of the FBI's evidence in support of its actions

1. Removal of Complainant's Bureau vehicle

According to the FBI, "[t]he surging cost of gasoline in Fall 2005 caused SAC Morrow to review NYFO vehicle usage []." RCAF, Tab 133 (FBI's Merits Brief) at 11. The FBI argues that the use of a Bureau vehicle is strictly limited by federal law to "official" purposes under 31 U.S.C. § 1344, and that, as an administrative support employee and not a federal law enforcement officer, Complainant was not entitled to a Bureau-issued vehicle. RCAF, Tab 23 (FBI's 4/20/07 Partial Motion to Dismiss) at 11; RCAF, Tab 133 (FBI's Merits Brief) at 11-12. The FBI asserts that, although Complainant was erroneously provided a Bureau vehicle for "home-to-work transportation," he was not legitimately entitled to one. *Id.* As a result, "the vehicle was reassigned to allow it to be more efficiently used by an employee who was assigned to range duties that required such transportation []." *Id.* at 12.

It is not for OARM to assess whether the FBI's original assignment of a Bureau vehicle to Complainant was authorized by the applicable statutory and regulatory provisions. *See* 31 U.S.C. § 1344; 41 C.F.R. part 102-34. Rather, OARM considers the FBI's arguments only insofar as they are relevant to OARM's assessment of the strength of the FBI's evidence in support of its burden of proving that its decision to take away Complainant's Bureau-assigned vehicle was not retaliatory.

Weighing against the FBI's argument that Complainant was not entitled to a Bureau vehicle is the fact that he was assigned a Bureau car for 11 years at the time of this action. Further undercutting the FBI's claim that, as an administrative support employee, Complainant was not entitled to a Bureau vehicle is the fact that SAC Morrow reassigned Complainant's Bureau vehicle to another *support employee* in the firearms unit. OIG's ROI, Ex. 30 (OIG's MOI of 5/31/06 Interview of Morrow) at 2; [redacted] Dep. at 68-69. According to SAC Morrow, "[t]his employee had been vouchering significant mileage for reimbursement and needed a car to transport firearms material to the different sites. This was a matter of cost savings to the agency." OIG's ROI, Ex. 30 (OIG's MOI of 5/31/06 Interview of Morrow) at 2. We find unpersuasive SAC Morrow's statement in that regard, particularly in view of the FBI's other statements of record that Complainant's car was to be "parked," *i.e.*, "off the road during the gas shortage." Powell Dep. at 124; Kobus Aff., Ex. W (Powell's 10/17/05 email regarding "money matters"); [redacted] Dep., Ex 8 (11/18/05 EC) at 7 (In addressing Complainant's concerns regarding his Bureau vehicle, "STIS Kobus was reminded of the office-wide policy to 'park' cars in direct response to the Hurricane Katrina gasoline price increases.").

In accordance with *Carr*, in balancing the relevant strength of the FBI's evidence in support of its decision to take away Complainant's assigned Bureau vehicle, we find that the FBI's evidence is weak.

2. Complainant's reassignment from his STIS Position in the Ops Center to the 24th Floor of 26 Federal Plaza

According to the FBI, "there were multiple reasons for reassigning Complainant from the Operations Center." RCAF, Tab 141 (FBI's Surreply) at 3. For example, ASAC [redacted] and SAC Morrow claimed that Complainant was not performing, or did not have the opportunity to perform, at the GS-13 level in his STIS position in the Ops Center and that his reassignment to the Occupational Safety Officer position would provide him with an opportunity for professional advancement. [redacted] Dep. at 42, 53-54, 93-94, 143, Ex. 8 (11/18/05 EC) at 7; Ex. 20 ([redacted] 6/5/06 Aff.), ¶ 32; OIG's ROI, Ex. 30 (OIG's MOI 5/31/06 Interview of Morrow) at 2. When asked by OIG whether she had told Complainant that he had not been performing at the GS-13 level in his STIS position, ASAC [redacted] responded:

> I indicated to him it was possible, through no fault of his own, that certain duties and responsibilities which are associated with a GS-13 employee level had been

> reassigned to other entities over time (it should be noted that the position description for the position encumbered by Mr. Kobus was last updated in 1995) and review of Mr. Kobus' actual duties compared to the duties of a GS-13 employee needed to be accomplished to determine whether his duties had been eroded over time. I also told him I was aware (because the selecting panel reported its selection to me in my role as the ADMIN ASAC) he had applied for the GS-14 AO job the previous year and had not gotten the job because he did not have enough experience. The TDY assignment [(to the Occupational Safety Officer position)] would make his resume more detailed if he wanted to apply again and/or another GS-14 job became open.

[redacted] Dep., Ex. 20 ([redacted] 6/5/06 Aff.), ¶ 32; Kobus Aff. ¶ 84. Weighing against this evidence is the fact that Complainant's assignment to the Occupational Safety Officer position had no supervisory responsibilities and did not provide him with opportunities for professional advancement, as claimed by [redacted] and Morrow.[26]

ASAC [redacted] also claimed that she and SAC Morrow first considered reassigning both Complainant and SSA Powell from the Ops Center for 120 days so that FBIHQ could conduct a "full audit" of the Ops Center. [redacted] Dep. at 51-53. SAC [redacted] told OIG: "At no time was [the] decision to move Kobus [] retaliatory. It was an operational decision in order to conduct an objective audit." *Id.*, Ex. 20 ([redacted] 6/5/06 Aff.), ¶ 18. Notably, however, as pointed out above, *see supra* n.15, no audit of the Ops Center was ever conducted. Moreover, general statements by SAC Morrow and ASAC [redacted] that they did not retaliate against Complainant are insufficient to establish clear and convincing evidence. *See Schnell v. Dep. of the Army*, 114 M.S.P.R. 83, ¶ 24 (2010).

The FBI also cites as a reason for Complainant's reassignment the need to separate him and SSA Powell (*i.e.*, "the feuding parties") until OIG completed its investigation in March of 2007.

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[26] ASAC [redacted] testified that Complainant's reassignment to the Occupational Safety Officer position would give him the opportunity to manage a program as opposed to people. [redacted] Dep. at 93. ASAC [redacted] testified, however, that Complainant was reassigned the Occupational Safety Officer position because it was the only position available for him to continue at the GS-13 level while not in the Ops Center. [redacted] Dep. at 25. According to Complainant, upon his reassignment to the Occupational Safety Officer position, he was responsible for handing out "escape hoods" with CD-rom instructional videos, implementing a 2006 Environmental Protection Agency report by making a "Waste Oil" sign and posting it on oil disposal cans in the FBI's motor-vehicle facilities, and completing a 2006 Occupational Safety and Environmental Health report. Kobus Aff., ¶¶ 87-88, 93-94. Complainant avers that he never received the requisite training necessary to perform the substantive duties of his Occupational Safety Officer position. *Id.*

RCAF, Tab 133 (FBI's Merits Brief) at 6; Mershon Dep. at 30. Undercutting the FBI's argument in this regard is the fact that in November 2007, *following* OIG's March 8, 2007 Report of Investigation (and the July 13, 2007 directive from the Director's Office that the NYFO "immediately reinstate Kobus to his prior position with appropriate office space"), Complainant's "TDY" reassignment, then to the Physical Security Specialist position, was again extended. RCAF, Tab 127 (Complainant's Merits Brief) at 43-44; Mershon Dep., Ex. 3. Further, based on our review of the record before us, it appears that Complainant was *never* returned to his position in the Ops Center. Moreover, we find unpersuasive the FBI's claim that Complainant, rather than SSA Powell, was reassigned from the Ops Center because there was no lateral SSA position in the Admin Div to which Powell could be reassigned. RCAF, Tab 133 (FBI's Merits Brief) at 6; [redacted] Dep. at 74-75, 96.[27] The evidence of record presented by Complainant suggests that, during 2005 and 2006, the NYFO maintained at least 10 Acting SSA (A/SSA) positions (all in divisions other than the Admin Div). RCAF, Tab 136 (Complainant's Reply Brief) at 14; Kobus 3/5/09 Reply Aff., Ex. A. Although ASAC [redacted] testified that she never had any discussions with SAC Morrow about moving SSA Powell to a position in a division other than the Admin Div, neither she, nor anyone else from the FBI, has explained why SSA Powell could not have been temporarily reassigned to an SSA position in another division as purportedly needed to separate him from Complainant during the relevant time period. [redacted] Dep. at 74-75.

We find the statements of [redacted] Morrow, and Mershon underlying the FBI's reasons for its decision to effect Complainant's reassignment from his STIS position in the Ops Center to be inconsistent and unsubstantiated by the evidence of record.

3. Complainant's nonselection for the GS-14 Acting AO Position

As noted above SAC Morrow and ASAC [redacted] issued an internal canvass for a temporary GS-14 Acting AO position on June 16, 2006, because the incumbent Acting AO [redacted] position was expiring and was not to be renewed, and [redacted] initially did not want to continue in the position through the NYFO's scheduled inspection for October 2006. [redacted] Dep. at 56-57;

[27] FBI OPR adjudicated the retaliation and other misconduct allegations against [redacted], [redacted] Powell investigated by OIG, and concluded, among other things, that: "To assert that Powell was not transferred because there was no appropriate position available is unpersuasive; New York is a large field office and it is unimaginable that there was not an SSA position vacant somewhere in the Division for Powell to assume." Thayer 12/18/08 Declaration, Ex. 16 (FBI OPR Adjudication Unit 7/2/07 Report) at 13.

Kobus Aff., ¶ 108, Ex. SS. Complainant applied for the position on July 5, 2006. Kobus Aff., ¶ 108, Ex. TT. [redacted] testified that she told SAC Morrow that Complainant and one other individual had applied for the position. [redacted] Dep. at 60. After receipt of the applications, ASAC [redacted] and SAC Morrow discussed the Acting AO position and "whether or not [they] could convince [redacted] to continue on for the better of the office and the inspection process at that point." *Id.* at 60-61. [redacted] ultimately agreed to continue in the Acting AO position and [redacted] thereafter withdrew the posting for the Acting AO position. *Id.*, at 61.

According to the FBI:

> [T]he decision to cancel the notice was based upon the decision of the then-[A/]AO to remain in the position longer than she had intended, in order to provide corporate memory for the impending scheduled inspection. [] In fact, retaining the incumbent had previously been the preferred solution to handling the impending inspection, but she was not interested in staying in the position due, apparently, to the expiration of the higher pay rate. Once FBIHQ agreed to allow her to continue in the position at the higher pay rate, she agreed to remain. The decision was made by ASAC [redacted] and SAC Morrow merely concurred with this pre-existing plan as a better option than having another person take over the job immediately before a major planned inspection. Despite [C]omplainant's contention, there is nothing pretextual about his decision, it was a stopgap measure to allow the NYFO to successfully complete the scheduled inspection and not lose the incumbent's depth of knowledge.

RCAF, Tab 133 (FBI's Merits Brief) at 15.

Although the FBI asserts that it was advantageous to have Acting AO [redacted] provide continuity in service through the October 2006 inspection, we are not convinced that the FBI would have withdrawn the vacancy announcement and effectively failed to appoint Complainant to the Acting AO position in the absence of his protected disclosures. The timing of events here – *i.e.*, *after* learning that Complainant and one other candidate had applied for the position, ASAC [redacted] and SAC Morrow went back to [redacted] to "convince" her to continue in the position – suggests that [redacted] and Morrow were not pleased with the applications they received for the Acting AO position, one of which was Complainant's. Nowhere, however, has the FBI asserted that Complainant lacked the requisite qualifications for the position, or that he was a less desirable candidate compared to [redacted] We find of particular significance the unrefuted evidence of record suggesting that [redacted] was not the best qualified for the position. Specifically, in response to SAC Morrow's and ASAC [redacted] request that [redacted] be noncompetitively

promoted to the permanent GS-14 AO position, the Chief of the FBI's Human Resources Management Section, Administrative Services Division stated, in relevant part:

> [B]ased on the audit conducted by my staff of the work being performed by [redacted] in the fall of 2005, she was not even performing at the AO GS-13 level. I am also concerned that in discussions with NY Executive Management, both on site and during our video conference, it was clearly stated by NY that it was their belief that [redacted] was not qualified, nor in their estimation, would she be able to perform the full range of duties that an AO should be performing. I certainly understand NY's concern about the impending inspection. However, this is such a critical position to the NY office, I do not believe it would be wise to make this decision to avert a potential inspection issue.

Thayer 12/18/08 Declaration, Ex. 18 (7/26/06 E-mail from [redacted] re: "Denial of Request to Non-Competitively Promote A/AO [redacted]

Absent additional information, we find the FBI's evidence in support of the action to be weak.

4. The FBI's threat to deny Complainant's military leave

As noted above, ASAC [redacted] and SSA [redacted] attempted to deny Complainant's requests for military leave in October 2005 and February 2006 when they told him his use of military leave would not be authorized until he provided written military orders from his commanding officer. Specifically, on October 6, 2005, Complainant requested military leave for October 7, October 14, and October 17, 2005. [redacted] Dep., Ex. 11. On October 11, 2005, ASAC [redacted] advised Complainant that he needed to present military orders before he would be authorized to take military leave. *Id.* On October 12, 2005, Complainant sent [redacted] an e-mail explaining that his commanding officer had provided him with an e-mail that documented the dates of his military duty and provided a reason as to why actual orders were not yet available. *Id.* ASAC [redacted] advised Complainant that he should provide all documentation to SSA Powell and SSA Powell would make the decision regarding his request for military leave. *Id.*; Powell Dep., Ex. 13. SSA Powell approved Complainant's military leave on October 13, 2005, based on "preliminary paperwork" and "voice mails [he] received from the Coast Guard representatives," but advised Complainant that he would "still need the actual orders or sufficient documentation for this tour . . . ." *Id.*

In January 2006, Complainant requested military leave for IDT scheduled for February

2006. Kobus Aff., ¶ 99. SSA [redacted] initially denied Complainant's request, advising him that military orders were required for him to authorize military leave. *Id.*; [redacted] Dep. at 61. [redacted] advised Complainant that, at the direction of ASAC [redacted] Complainant would not be granted military leave unless he provided military orders. *Id.*; [redacted] Dep. at 62-63. Once Complainant indicated that there was a problem in acquiring the orders for IDT, [redacted] suggested that FBIHQ be contacted for clarification as to what was required for IDT. [redacted] Dep. at 64-66. Complainant e-mailed FBIHQ, and, in response, FBIHQ advised him that he did not need military orders for IDT; rather, a letter from his commanding officer was sufficient. *Id.* at 66-67, Ex. 6. Complainant forwarded the information from FBIHQ to [redacted] who thereafter granted Complainant's request for military leave. *Id.*

The FBI claims that ASAC [redacted] and SSA [redacted] unfamiliarity with the nuances between the documentation requirements involved with active duty training and IDT "did not obviate the requirement that the complainant provide some appropriate documentation to his agency to account for his absences." RCAF, Tab 133 (FBI's Merits Brief) at 10 (emphasis in original). Contrary to the FBI's argument, Complainant did, in fact, offer to present an e-mail from his commanding officer that specified the dates of Complainant's requested tour of duty in October 2005. [redacted] Dep., Ex. 11. Despite that, ASAC [redacted] continued to insist that "military orders" were required in order for his military leave for IDT to be authorized. ASAC [redacted] told Complainant during the October 24, 2005 meeting (during which she advised Complainant of his reassignment to the Occupational Safety Officer position) that he would not be permitted to take any military leave unless he produced military orders from the Coast Guard, and advised SSA [redacted] the same. Powell Dep. at 113; [redacted] Dep. at 63; Kobus Aff., ¶ 54. Aside from ASAC [redacted] and SSA [redacted] claimed unfamiliarity with the requirements for approving military leave for IDT, the FBI asserts: "[T]here is no basis to believe that a protected disclosure was in any way a contributing factor to the decision to require that complainant comply with federal law and agency policy and prove proper documentation of his absences from work for military duties." RCAF, Tab 133 (FBI's Merits Brief) at 11.

ASAC [redacted] has not indicated that she imposed the same requirements for military orders on any other non-whistleblower employee making a request for military leave for IDT, or that this was the first time she was presented with the issue. *Cf.* [redacted] Dep. at 64-65

("[Complainant] was the first individual I have ever had under me that ever requested military leave, so I was not an expert on the matter . . . ."). Without more, we are not left with a "firm belief" that ASAC [redacted] would have threatened to deny Complainant's requests for military leave absent his protected disclosures. *See Schnell*, 114 M.S.P.R. 83, ¶¶ 23-24; *Chambers*, 116 M.S.P.R. ¶ 71.

B. The evidence shows that SAC Morrow and ASAC [redacted] had some motive to retaliate against Complainant for his protected disclosures.

When a whistleblower makes highly critical accusations of an agency's conduct, an agency official's merely being outside that whistleblower's chain of command, not directly involved in alleged retaliatory actions, and not personally named in the whistleblower's disclosure is insufficient to remove the possibility of a retaliatory motive or retaliatory influence on the whistleblower's treatment. *Whitmore*, 680 F.3d at 1371. Since direct evidence of retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate. *Id.*; *McCarthy*, 116 M.S.P.R. 594, ¶ 31. Thus, when applying the second *Carr* factor, OARM will consider any motive to retaliate on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision. *Id.*

SAC Morrow told OIG that Complainant "made him angry" when Complainant sent him his October 6, 2005 e-mail disclosure after Morrow specifically directed Complainant and SAC Powell to "stop the email battle" between them. OIG's ROI, Ex. 30 (OIG's MOI of 5/31/06 Interview of Morrow) at 2. In her affidavit to OIG, SAC [redacted] confirmed that "SAC Morrow was upset and frustrated over the [October 6, 2005] email, because he had sent out an 10/05/06 [e-mail] asking/directing all emails to stop." [redacted] Dep., Ex. 20 at ¶¶ 22-24. With respect to ASAC [redacted] Complainant alleges that, during a meeting with all of Squad OI-1 on October 18, 2005, ASAC [redacted] stated that she would "deal with Kobus" when he returned from military leave and that if "the Kobus 'situation'" did not stop, she would transfer all three support managers (*i.e.*, Complainant, STIS [redacted] and Communications Supervisor [redacted] and that the squad would "pay for it." Kobus Aff., Ex. II at 4. This was corroborated by [redacted] and [redacted] during their interviews with OIG. OIG's ROI, Ex. 31 (OIG's MOI of 1/27/06 Interview of [redacted] at 3, Ex. 38 (OIG's MOI of 1/31/06 Interview of [redacted] at 4. Additionally, ADIC

Mershon testified during his deposition that his "general recollection" was that ASAC [redacted] was upset by Complainant's disclosure to OIG, as she "believed that she had been unfairly complained against." Mershon Dep. at 22.[28]

We find that the record evidence, as well as the timing of the personnel actions at issue, suggests that SAC Morrow and ASAC [redacted] the two officials primarily responsible for taking (or influencing) the personnel actions against Complainant, had some motive to retaliate against him for his protected disclosures. *See Chambers*, 116 M.S.P.R. 17, ¶ 66 (the timing of the appellant's placement on administrative leave and removal, shortly after her protected disclosures, suggested that the agency was motivated to retaliate against her based on her disclosures).

C. There is no evidence that the FBI took similar actions against any similarly situated non-whistleblower.

We now turn to the third *Carr* factor, *i.e.*, any evidence that the FBI took similar actions against other employees who are not whistleblowers, but who are otherwise similarly situated to Complainant.

For a comparison employee to be similarly situated to Complainant, all relevant aspects of Complainant's employment situation must be nearly identical to those of the comparison employee. *See Spahn v. Dep't of Justice*, 93 M.S.P.R. 195, 202 (2003). Among other things, a comparative employee must have engaged in conduct similar to Complainant's without differentiating or mitigating circumstances that would distinguish their misconduct or the appropriate discipline for it. *See Pleasant v. Dep't of Housing & Urban Development*, 98 M.S.P.R. 602, ¶ 15 (2005); *Cf.*, *Whitmore*, 680 F.3d at 1373 ("*Carr* . . . requires the comparison employee to be 'similarly situated' – not identically situated – to the whistleblower.").

Here, neither party has identified any employee that can be considered a similarly situated comparative employee. Thus, this factor is effectively removed from OARM's analysis, as no meaningful comparison between the actions taken against Complainant and the lack of action against any other employees can be made. *See Whitmore*, 680 F.3d at 1374 ("[T]he absence of any evidence relating to *Carr* factor three can effectively remove that factor from the analysis.");

[28] In his November 17, 2005 letter to OIG, Complainant alleged, among other things, that ASAC [redacted] engaged in a pattern of verbal abuse and harassment against him by making demeaning and degrading comments about him, admonishing him "for daring to report SSA Powell's misconduct," and threatening his employment with the FBI. Kobus Aff., Ex. II at 4-5.

McCarthy, 116 M.S.P.R. 594, ¶ 65 (finding no evidence of the agency taking similar actions against similarly situated non-whistleblowers, and therefore concluding that "the third *Carr* factor is not a significant factor for the Board's analysis in the instant appeal."). In some circumstances, "the absence of any evidence concerning *Carr* factor three may well cause the agency to fail to prove its case overall." *Whitmore*, 680 F.3d at 1374; *see also Chambers*, 116 M.S.P.R. ¶ 71 (finding that "we are simply not left with a 'definite and firm conviction' that the agency would have taken any action based on the sustained charges in the absence of [the appellant's] protected disclosures" in large part because the agency "did not show that it took similar actions against similarly-situated non-whistleblowers."); *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 327-328 (1997) ("Weighing the three factors . . . , we find that although the reporting officials had strong evidence to support their reports concerning the appellant, this factor is far outweighed by their strong motive to retaliate and the lack of any evidence showing that they treated non-whistleblower employees the same way they treated the appellant.").

Weighing the three *Carr* factors against one another, we find that the FBI failed to establish by clear and convincing evidence that it would have taken the same personnel actions against Complainant in the absence of his protected disclosures.

IV. Complainant is entitled to corrective relief.

Because Complainant has prevailed on the merits of his RCA and the FBI has failed to meet its burden of proof by clear and convincing evidence, Complainant is entitled to corrective relief. Pursuant to 28 C.F.R. § 27.4(f), if the Director of OARM orders corrective action, such corrective action may include:

> placing the Complainant, as nearly as possible, in the position he would have been in had the reprisal not taken place; reimbursement for attorneys fees, reasonable costs, medical costs incurred, and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages.

Id.

Complainant seeks corrective action in the form of declaratory and injunctive relief; compensatory damages "for the mental anguish, distress and humiliation to which he was subjected"; attorneys' fees and costs, and disciplinary action against "those FBI supervisors who retaliated against [him]." RCAF, Tab 127 (Complainant's Merits Brief) at 64-66. Complainant has the burden of proving his claimed damages. *See Johnston v. Dep't of the Treasury*, 100

M.S.P.R. 78, ¶13 (2005).

A. Placement in a supervisory GS-13 position

In order to place Complainant "as nearly as possible, in the position he would have been in had the [retaliatory reassignment from his STIS position] not taken place," the FBI shall offer Complainant the opportunity to return to his former STIS position in the Ops Center, or to be placed in a substantially equivalent GS-13 position that is comparable in supervisory responsibilities, promotion potential, and work location (*i.e.*, office space commensurate to the office he had as an STIS).[29]

B. Bureau vehicle

To correct the retaliatory removal of his Bureau assigned vehicle, the FBI shall assign Complainant a Bureau vehicle, if so authorized by the applicable statutory and regulatory provisions for official FBI use.[30] *See* 31 U.S.C. § 1344; 41 C.F.R. part 102-34. Complainant may also be entitled to any reasonable costs he incurred due to the loss of any authorized use of his Bureau car in 2005. *See id.* In his brief on the merits, Complainant claims that he incurred approximately $150.00 per month in additional commuting costs as a result of the loss of his FBI vehicle in 2005. RCAF, Tab 127 (Complainant's Merits Brief) at 64, n.24. As ordered below, Complainant shall submit any documentation he has in support of his claim for reimbursement for costs he incurred as a result of the FBI's retaliatory removal of his authorized use of a Bureau assigned vehicle.

C. Back pay

Because Complainant met his burden of proof with respect to his claim that the FBI failed to appoint him to the GS-14 Acting AO position – and the FBI has failed to meet its burden of

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[29] It is unclear whether, at the time of issuance of this decision, Complainant is already in a supervisory GS-13 position that is substantially equivalent to his STIS position. Documentation submitted with Complainant's subsequent RCA filed with OARM on November 30, 2011, indicated that, at that time, he was in a GS-13 Operations Manager position. If Complainant is not already in a supervisory GS-13 position that is substantially equivalent to his former STIS, the FBI shall effect such placement. In the event Complainant has been promoted to a level above a supervisory GS-13 during the course of proceedings in this case, he shall not be demoted.

[30] According to Complainant, he "regained the use of an FBI vehicle" in January 2008, at the time he was placed in the Deputy AO position as a result of OIG's report of investigation of retaliation. Kobus Aff., ¶¶ 117-118. To date, we are unclear as to the current status of his use of a Bureau vehicle.

proving by clear and convincing evidence that it would have decided not to select Complainant for the position (by withdrawing the vacancy announcement) in the absence of his protected disclosures – Complainant is entitled to back pay and interest on the back pay for the time period covered by the corrective action (*i.e.*, beginning from the date on which the FBI filled the position until the permanent GS-14 AO position was filled).

The FBI shall compute the amount of Complainant's back pay award under the Back Pay Act, 5 U.S.C. § 5596, and OPM's implementing regulations, 5 C.F.R. § 550.881, which provide, in pertinent part:

> When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee –
>
> The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred.

5 C.F.R. § 550.805(a)(2).[31]

D. Attorneys' fees

The Director of OARM is authorized under 28 C.F.R. § 27.4(f) to order corrective relief in the form of Complainant's reimbursement for attorneys' fees and costs. Complainant's counsel is directed to submit a motion for reasonable attorneys' fees and costs, as ordered below.

E. Medical expenses

Under 28 C.F.R. § 27.4(f), OARM is authorized to order the FBI to reimburse Complainant for "medical costs incurred." Complainant, however, bears the burden of proving that any medical costs he incurred were reasonable and foreseeable consequential damages (*i.e.*, causally related to the FBI's reprisal against him). According to Complainant, he "attended psychological counseling sessions as a result of the harm he suffered, some portions of which (approximately $160.00) were not paid by the FBI[.]" RCAF, Tab 127 (Complainant's Merits Brief) at 64, n.24. As ordered below, Complainant is directed to submit any medical bills or

[31] OARM is deemed an "appropriate authority" under 5 C.F.R. § 550.803, which is defined in relevant part, as "an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including . . . the head of the employing agency or another official of the employing agency to whom such authority is delegated."

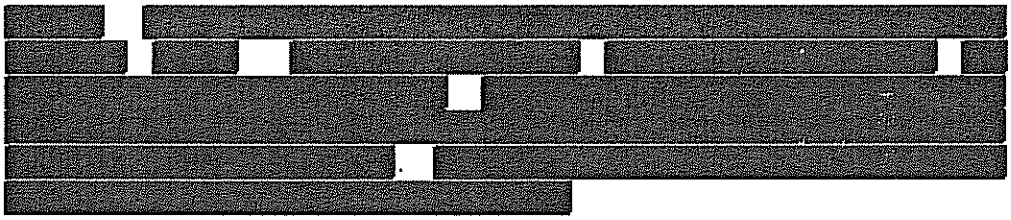
other documentation in support of his claim for reimbursement of any medical costs he incurred as a result of the FBI's reprisal against him.

F. Disciplinary action

Neither 5 U.S.C. § 2303 nor 28 C.F.R. § 27.4(f) authorize OARM to take disciplinary action against those responsible for unlawful reprisal. The purpose of 28 C.F.R. § 27.4(f) is to place a prevailing complainant, as nearly as possible, in the position he would have been in had the unlawful reprisal for his protected whistleblowing activities not occurred, not to punish or discipline those responsible for the unlawful reprisal. Absent any provision to the contrary, OARM lacks the authority to discipline those responsible for unlawful reprisal.[32] Rather, the FBI retains the authority to render disciplinary decisions involving its employees.

Here, it appears that only ASAC [redacted] and SSA [redacted] are still employed by the FBI. We note that FBI OPR previously adjudicated Complainant's reprisal claims against [redacted] SSA Powell. *See supra* n.27; Thayer 12/18/08 Declaration, Ex. 16. With respect to [redacted]

[32] 28 C.F.R. part 27 was promulgated by a final rule issued by the Department of Justice on November 1, 1999. *See* 64 FR 58782 (Nov. 1, 1999). Therein, the Department considered and rejected one commenter's suggestion that the rule contain a provision for disciplinary proceedings in accordance with 5 U.S.C. § 1215 (which authorizes the Board to impose disciplinary action against an employee responsible for unlawful retaliation pursuant to a complaint by the Office of Special Counsel). *Id.* at 58785. The Department noted that "[s]ection 2303 (the source of authority for the rule) requires implementation of its substantive protections 'in a manner consistent with applicable provisions of sections 1214 and 1221' but is silent as to section 1215." *Id.* The Department further noted that "[it] retains its own independent authority to take appropriate disciplinary action if it determines such action to be necessary[,]" and the "rule does not prohibit or preclude [it] from taking appropriate disciplinary action under its existing authority." *Id.*



Id. at 15-16, 22.

OARM reviews matters *de novo* and may receive additional evidence and reach legal conclusions not previously available to FBI OPR. Therefore, OARM will provide copies of this decision to the Director of the FBI and other appropriate officials or offices to consider whether, in light of the findings and conclusions made herein, any management or disciplinary action (or further disciplinary action) against the involved supervisory personnel is warranted.

G. Injunctive relief

OARM lacks the authority to issue an injunction enjoining the FBI from engaging in future retaliation against Complainant. However, Complainant may, at any time, avail himself of the protections provided by 28 C.F.R. part 27, in the event he believes he is being further retaliated against for his whistleblowing activities.

H. Compensatory damages

The FBI whistleblower protections provided by 5 U.S.C. § 2303 and 28 C.F.R. part 27 do not currently authorize corrective relief in the form of compensatory damages. However, the recent passage of the WPEA presents OARM with a matter of first impression – namely, whether compensatory damages may now be authorized under 5 U.S.C. § 2303(c).

Under § 2303(c), "[t]he President shall provide for the enforcement of § 2303 in a manner consistent with applicable provisions of sections 1214 and 1221 of [title 5, United States Code]." Section 107(b) of the WPEA authorizes the Board to award compensatory damages in prohibited personnel practice and individual right of action reprisal cases, as follows:

> Sections 1214(g)(2) and 1221(g)(1)(A)(ii) of title 5, United States Code, are amended by striking all after 'travel expenses,' and inserting 'any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).' each place it appears.

As ordered below, Complainant is directed to submit his arguments on the issue of

whether, in light of the WPEA, an award of compensatory damages is authorized and appropriate in this case.

CONCLUSION

Based on the foregoing, Complainant has proved by preponderant evidence that he made protected disclosures under 28 C.F.R. § 27.1(a) to SAC Morrow, FBI OPR, and OIG that were a contributing factor in the FBI's decision to take a number of personnel actions covered by 28 C.F.R. § 27.2(b) against him (including its decisions to: take away his Bureau assigned vehicle; reassign him from his STIS position in the Ops Center and subject him to a hostile work environment when it assigned him to a work location on the 24th floor of 26 Federal Plaza; threaten to deny his requests for military leave; and not select him for the GS-14 Acting AO position). Because the FBI has failed to prove by clear and convincing evidence that it would have taken the personnel actions in the absence of Complainant's protected disclosures, Complainant is entitled to corrective relief, as ordered below.

ORDER

It is hereby

ORDERED that Complainant's RCA is GRANTED.

IT IS FURTHER ORDERED that, within 20 calendar days of the date of this Order, the FBI return Complainant to the status quo ante, unless otherwise already promoted, see *supra* n.29, by offering to return Complainant to his former STIS position in the Ops Center, or to place him in a substantially equivalent position with comparable supervisory responsibilities, promotion potential, and work location, and by also providing Complainant with a Bureau assigned vehicle (if authorized by the applicable statutory and regulatory provisions).

IT IS FURTHER ORDERED that, not later than 60 calendar days of the date of this Order, the FBI issue a check to Complainant to include the appropriate amount of back pay and interest on the back pay (to be calculated by the FBI in accordance with the applicable OPM back pay regulations, *see* 5 C.F.R. part 550, Subpart H) for a period from the date on which the GS-14 Acting AO position was initially filled to the date on which the Acting AO position was subsequently filled by the permanent GS-14 AO.

IT IS FURTHER ORDERED that, within 15 calendar days of the date of this Order, Complainant submit to OARM and serve on the FBI: (1) documentation and an explanatory

itemized statement in support of his request for reimbursement for costs incurred due to the loss of his Bureau assigned vehicle in 2005, and a showing that the costs incurred were authorized by the applicable statutory and regulatory provisions, *see* 31 U.S.C. § 1344; 41 C.F.R. part 102-34; (2) documentation and an explanatory itemized statement in support of his request for medical costs he incurred as a result of the FBI's reprisal; and (3) his arguments on the issue of whether OARM is authorized to award compensatory damages in this case in light of the WPEA.

IT IS FURTHER ORDERED that, within 15 calendar days of the date of service of Complainant's submission made pursuant to this Order, the FBI submit to OARM and serve on Complainant its response thereto. Any submissions made by the parties pursuant to this Order shall not exceed 15 double-spaced pages.

IT IS FURTHER ORDERED that, within 15 calendar days of the date on which the time for an appeal expires if no appeal is filed, or within 15 calendar days of the date of any final decision by the Deputy Attorney General on appeal, Complainant's counsel submit to OARM and serve on the FBI a written request for reasonable attorneys' fees.[33] The fee request shall include: a copy of the fee agreement between Complainant and his counsel, if one exists; the number of hours spent on Complainant's case, with accurate and current time records; evidence of the attorneys' customary billing rates for similar work, with evidence that those rates are consistent with the prevailing community rates for similar services in the communities in which the attorneys ordinarily practice; and an itemization of related costs.

Dated: February 13, 2013

Louis DeFalaise, Director
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U.S. Department of Justice
450 5th Street, N.W., Suite 10200
Washington, D.C. 20530

[33] The time for filing a request for review of OARM's Final Determination by the Deputy Attorney General under 28 C.F.R. § 27.5 will begin to run upon issuance of OARM's Corrective Action Order on Complainant's request for costs related to the loss of his Bureau vehicle in 2005, medical costs incurred, and any compensatory damages.

Sent via e-mail and Federal Express to:

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